SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 539

DOUBLEDAY & COMPANY, INC., APPELLANT,

vs.

PEOPLE OF THE STATE OF NEW YORK

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

INDEX

	Original	Print
Record on appeal to Court of Appeals of New York	1	1
Statement under Rule 234	1	1
Notices of appeal to Appellate Division	2	2
Copy of first information filed July 24, 1946	5	3
Copy of second information filed July 24, 1946	6	4
Endorsements on informations	7	5
Minute entries of trial and conviction	12	8
Statement of evidence	14	9
Caption and appearances	14	9
Motion to consolidate and order granting same	15	9
Motion for severance and order granting same	15	10
Motion for leave to amend information and order granting same	15	10
Testimony of Harry Kahan	16	11
Defendant's motion to dismiss	21	14
Testimony of Thomas R. Burns	22	14
Lionel Trilling	36	25
Defendant's motion to dismiss	55	38
Colloquy between Court and counsel	56	39
Decision	58	41
Stipulation as to exhibits not printed	65	46
Defendant's Exhibits:		
"B"—Advertisement	67	46
"B-1"—Advertisement	69	46
"B-2"—Advertisement	71	46
"B-3"—Advertisement	73	46
"B-4"—Advertisement	75	46

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 24, 1948.

—6595

	Original	Print
Record on appeal to Court of Appeals of New York—Continued		
Dissenting opinion, Perlman, J.	76	47
Affidavit of no majority opinion	79	48
Clerk's certificate (omitted in printing)	80	
Notice of appeal to Court of Appeals	81	49
Order of affirmance by Appellate Division	83	50
Certificate of leave to appeal to Court of Appeals	85	51
Defendant's Exhibit "A"—Translation of pages 300, 307-317 in "Memoirs of Hecate County", by Edmund Wilson	86	51
Remittitur of the Court of Appeals	98	60
Order allowing appeal	119	61
Appellant's petition for appeal, assignment of errors and prayer for reversal	121	62
Citation issued upon appeal (omitted in printing)	123	
Bond on appeal (omitted in printing)	126	
Stipulation as to record on appeal	129	64
Clerk's certificate (omitted in printing)	132	
Statement of points to be relied upon and designation of record	134	66
Order noting probable jurisdiction	137	67

POOR COPY

BLEED THROUGH

[fol. 1]

IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

PEOPLE OF THE STATE OF NEW YORK, Complainant-Respondent,

against

DOUBLEDAY & COMPANY, INC., Defendant-Appellant

STATEMENT UNDER RULE 234

The District Attorney of the County of New York filed two informations in the Court of Special Sessions of the City of New York on July 24, 1946. The first information (No. 3176) contained two counts charging the defendant Doubleday & Company, Inc., with violations of Section 1141 of the Penal Law. The first count charged that defendant unlawfully gave information as to where a certain obscene book entitled "Memories of Hecate County" could be purchased; the second count in said information charged the said defendant with publishing said "Memories of Hecate County." The second information (No. 3177) charged the defendant with selling "Memories of Hecate County."

Defendant pleaded not guilty to all counts in both informations on August 8, 1946.

A trial on said informations was had before the Court (Perlman, P. J., Oliver and Farrell, J. J.) on October 27, 1946.

[fol. 2] On motion of the people, the first count (giving information) of the first information (No. 3176) was dismissed on November 27, 1946. The Court (Perlman, J., dissenting) convicted defendant under the second count (publishing) of the first information (No. 3176) and of the charge (selling) in the second information (No. 3177), and fined defendant $500 on each conviction, making a total fine of $1,000.

There has been no change in the parties.

In Court of Special Sessions of the City of New York

People of the State of New York, Complainant,

against

Doubleday & Company, Inc., Defendant

Notice of Appeal

Sirs:

Please take notice that the above named defendant hereby appeals to the Appellate Division of the Supreme Court, First Judicial Department, from the judgment of conviction rendered against said defendant on November 27, 1946, in the Court of Special Sessions of the City of New York, New York County, whereby it was convicted of the crime [fol. 3] of selling a certain obscene, lewd, lascivious, filthy, indecent and disgusting book entitled "Memoirs of Hecate County," and from the sentence imposed upon it on November 27, 1946, whereby it was fined the sum of $500, and from each and every part of said judgment.

Dated: December 10, 1946.

Yours, etc., Satterlee, Warfield & Stephens, Attorneys for Defendant, Office and Post Office Address: 49 Wall Street, Borough of Manhattan, New York 5, N. Y.

To: Clerk, Court of Special Sessions of the City of New York; District Attorney of New York County.

[fol. 4] In Court of Special Sessions of the City of New York

People of the State of New York, Complainant,

against

Doubleday & Company, Inc., Defendant

Notice of Appeal

Sirs:

Please take notice that the above named defendant hereby appeals to the Appellate Division of the Supreme Court, First Judicial Department, from the judgment of conviction

POOR COPY

BLEED THROUGH

rendered against said defendant on November 27, 1946, in the Court of Special Sessions of the City of New York, New York County, whereby it was convicted of the crime of publishing a certain obscene, lewd, lascivious, filthy, indecent and disgusting book entitled "Memoirs of Hecate County," and from the sentence imposed upon it on November 27, 1946, whereby it was fined the sum of $500, and from each and every part of said judgment.

Dated: December 10, 1946.

Yours, etc., Satterlee, Warfield & Stephens, Attorneys for Defendant, Office and Post Office Address: 49 Wall Street, Borough of Manhattan, New York 5, N. Y.

To: Clerk, Court of Special Sessions of the City of New York; District Attorney of New York County.

[fol. 5] In Court of Special Sessions of City of New York

People *v.* Doubleday

No. 3176

First Information—Filed July 24, 1946

Be it remembered that I, Frank S. Hogan, the District Attorney of the County of New York, by this information, accuse the above-named defendant of the crime of giving information as to how obscene book can be obtained, committed as follows:

The said defendant, on July 1, 1946, at the City of New York, in the County of New York, unlawfully did write, print, publish and utter, and cause to be written, printed, published and uttered, an advertisement and notice giving information, stating, and purporting so to do, where, how, of whom, and by what means, a certain obscene, lewd, lascivious, filthy, indecent and disgusting book entitled "Memoirs of Hecate County" can be purchased, a more particular description of which said book would be offensive to this Court and improper to be spread upon the records thereof, wherefore such description is not here given.

Second Count

And I, the District Attorney aforesaid, by this information, further accuse the said defendant of the crime of publishing obscene book, committed as follows:

The said defendant, on the day and in the year aforesaid, at the City and in the County aforesaid, unlawfully did print, utter, publish and manufacture a certain obscene, [fol. 6] lewd, lascivious, filthy, indecent and disgusting book entitled "Memoirs of Hecate County," whereof a more particular description would be offensive to this Court and improper to be spread upon the records thereof, wherefore such description is not here given.

Frank S. Hogan, District Attorney.

In Court of Special Sessions of City of New York

People *v.* Doubleday

No. 3177

Second Information—Filed July 24, 1946

Be it remembered that I, Frank S. Hogan, the District Attorney of the County of New York, by this information, accuse the above-named defendant of the crime of selling obscene book, committed as follows:

The said defendant, on July 1, 1946, at the City of New York, in the County of New York, unlawfully did sell to one Harry Kahan, and did possess with intent to sell, lend, distribute, give away and show, a certain obscene, lewd, lascivious, filthy, indecent and disgusting book, entitled "Memoirs of Hecate County", whereof a more particular description would be offensive to this Court and improper to be spread upon the records thereof, wherefore such description is not here given.

Frank S. Hogan, District Attorney.

POOR COPY

BLEED THROUGH

[fol. 7] ENDORSEMENTS ON INFORMATION No. 3176

Cal. No. 2721.

3176

Court of Special Sessions of the City of New York, County of N. Y.

THE PEOPLE

vs.

DOUBLEDAY & Co., INC.

Information

Giving information as to how to obtain obscene book, publishing obscene book.

Frank S. Hogan, District Attorney.

Filed July 24, 1946.
Counsel .....

Adjournments:

October 14, 1946—People.
October 22, 1946—Consent.
October 29, 1946—.....

July 25, 1946 #62.

Hon. William B. Northrop, P. J.
Summons to issue returnable on August 8, 1946.

[fol. 8] August 8, 1946

Hon. Nathan D. Perlman, P. J., Hon. Irving B. Cooper.

Defendant pleads not guilty.

October 29, 1946 #30

Hon. Nathan D. Perlman, P. J., Hon. William A. Farrell, Hon. Frank Oliver, Associate Justices.

District Attorney's motion to amend information granted, Defendant not objecting (See Minutes).

On Trial—Decision reserved to November 27th, 1946.

Nathan D. Perlman, Presiding Justice.

November 27, 1946 #1

Hon. Nathan D. Perlman, P. J., Hon. William A. Farrell, Hon. Frank Oliver, Associate Justices.

On trial, Defendant Convicted on Count #2.
Justice Perlman dissents.
On Count #1—Motion of Assistant District Attorney Rogers to dismiss granted.
Fine $500.

Nathan D. Perlman, Presiding Justice.

[fol. 9] December 2nd, 1946 #30

Hon. William B. Northrop, P. J.
Fine of $500—Paid.

W. B. Northrop, Presiding Justice.

Entered in Fine Book—Page 141.
Witnesses: Harry Kahan, John S. Sumner, 215 W. 22nd St.

Endorsements on Information No. 3177

Cal. No. 2722.

3177

Court of Special Sessions of the City of New York, County of New York

The People

vs.

Doubleday & Co., Inc.

Information

Selling an obscene book.

Frank S. Hogan, District Attorney.

Filed—July 24, 1946.
Counsel.....

[fol. 10] Adjournments:

October 14, 1946—People.
October 22, 1946—Consent.
October 29, 1946—.....

POOR COPY

BLEED THROUGH

July 25, 1946 #63

Hon. W. B. Northrop, P. J.
Summons to issue returnable on August 8, 1946.

August 8, 1946

Hon. N. D. Perlman, P. J., Hon. Irving B. Cooper.
Defendant pleads not guilty.

October 29, 1946 #31

Hon. N. D. Perlman, P. J., Hon. W. A. Farrell, Hon. Frank Oliver, Associate Justices.

On trial decision reserved to Nov. 27, 1946.
Nathan D. Perlman, Presiding Justice.

Nov. 27, 1946 #2

Hon. N. D. Perlman, Presiding Justice; Hon. W. A. Farrell, Hon. Frank Oliver, Associate Justices.

[fol. 11] On trial defendant convicted.
Justice Perlman dissents (see opinion).
Fine $500.
Nathan D. Perlman, Presiding Justice.

December 2nd, 1946 #29

Hon. W. B. Northrop, P. J.
Fine of $500—Paid.
W. B. Northrop, Presiding Justice.

Entered in Fine Book—Page 141.
Witnesses: Harry Kahan, John S. Sumner, 215 W. 22nd St.

[fol. 12] IN COURT OF SPECIAL SESSIONS OF THE CITY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK

vs.

DOUBLEDAY & CO., INC., Defendant

Docket No. 3176. Year 1946. Charge giving information as to how to obtain obscene book. Publishing obscene book.

EXTRACT FROM CLERK'S MINUTES

Present, Honorables: Perlman, Farrell, Oliver, Justices.

I do certify that it appears from an examination of the Records of this office that Doubleday & Co., Inc., the above named defendant was on trial and convicted on count #2 on November 27, 1946. Judge Perlman dissents. Fined $500. Fine Paid, On Motion of Ass't District Attorney Rogers to dismiss count #1 is hereby granted.

A true extract from the minutes.

Dated, Dec. 10, 1946.

Joseph F. Moss, Clerk of Court.

[fol. 13] IN COURT OF SPECIAL SESSIONS OF THE CITY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK

vs.

DOUBLEDAY & CO., INC., Defendant

Docket No. 3177. Year 1946. Charge selling obscene book.

EXTRACT FROM CLERK'S MINUTES

Present, Honorables: Perlman, Farrell, Oliver, Justices.

I do certify that it appears from an examination of the Records of this office that Doubleday & Co., Inc. the above named defendant on trial and convicted on November 27, 1946 Justice Perlman dissents—See Opinion. Fined $500. Fine Paid.

A true extract from the minutes.

Dated, Dec. 10, 1946.

Joseph F. Moss, Clerk of Court.

POOR COPY

BLEED THROUGH

[fol. 14] IN COURT OF SPECIAL SESSIONS OF THE CITY OF NEW YORK, PART VI—NEW YORK COUNTY

THE PEOPLE OF THE STATE OF NEW YORK

against

DOUBLEDAY & Co., INC., Defendant

Charge: Giving information as to how to obtain obscene book; publishing obscene book.

THE PEOPLE OF THE STATE OF NEW YORK

against

DOUBLEDAY & Co., INC., Defendant

Charge: Selling obscene book.

STATEMENT OF EVIDENCE

Tried at 100 Centre Street, New York 13, N. Y. October 29, 1946.

Before Hon. Nathan D. Perlman, Presiding Justice; Hon. Frank Oliver, Hon. William A. Farrell, Associate Justices.

[fol. 15] APPEARANCES:

For the People: William P. Rogers, Esq., Assistant District Attorney, 155 Leonard Street, New York 13, N. Y.

For Defendant: Messrs. Satterlee, Warfield & Stephens, 49 Wall Street, New York, N. Y., by James F. Dwyer, Esq., and Milton Schilback, Esq., Of Counsel.

Court Clerk: Nos. 30 and 31, The People against Doubleday & Co., Inc.!

Justice Perlman: Both sides ready?

Mr. Schilback: Ready, your Honor.

MOTION TO CONSOLIDATE

Mr. Rogers: Your Honors, at this time the People move to consolidate the cases on the Calendar numbered 30 and 31, which are Information Nos. 3176 and 3177, for the purposes of the trial.

Mr. Schilback: The defendant jo-ns in the motion.

The Court: Motion is granted.

Motion for Severance

Mr. Rogers: Now, at this time, your Honors, the People move that the First Count in Information No. 3176, which count refers to the giving of information as to how an obscene book can be obtained, be severed from the other two counts; and that we proceed to trial on the two counts of selling the book and publishing the book.

Mr. Schilback: The defendant joins in the motion.

The Court: That motion is granted.

Motion for Leave to Amend Information

Mr. Rogers: Now, one further motion, your Honors.

The Information alleges in the count charging the crime of publishing an obscene book, that it was published on the same day that the book was sold, namely, July 1, 1946. The [fol. 16] People move at this time to amend that Information to allege that the publishing of the book was on March 7, 1946.

Mr. Schilback: The defendant makes no claim of surprise or variance.

Justice Perlman: Do you object to the amendment?

Mr. Schilback: No objection.

Justice Perlman: The amendment is allowed; and I think it is advisable to attach that amendment to the original information. There has been some difficulty in the past, when some of these cases were considered by an appellate tribunal, in determining just exactly what the information was. Therefore, I suggest that you type that amendment up and then attach it to the information.

Justice Oliver: Are you ready for the oath, gentlemen?

Mr. Rogers: Yes, your Honor.

Mr. Schilback: Ready.

POOR COPY

BLEED THROUGH

HARRY KAHAN, called as a witness on behalf of the People, having been duly sworn, testified as follows:

Court Attendant: State your name, address, and occupation.

The Witness: Harry Kahan, Special Agent, New York Society for the Suppression of Vice, 215 West 22d Street, Borough of Manhattan.

Direct examination.

By Mr. Rogers:

Q. Mr. Kahan, you are employed by the Society for the Prevention of Vice?

A. Suppression of Vice.

[fol. 17] Q. Suppression of Vice. And how long have you been so employed?

A. The past six years.

Q. Now, July 1, 1946, did you go to premises 670 Fifth Avenue, in the County of New York?

A. I did.

Q. And what happened there?

A. I entered a store and a gentleman, supposed to be the salesman, approached me and asked me what I wanted. I said I wanted a copy of "Memoirs of Hecate County." He said, "Yes. I will get—I will gladly give it to you." He obtained a copy of "Memoirs of Hecate County," handed it to me, and asked for $2.50, plus 5 cents tax. I paid him the money and he gave me a receipt, wrapped up the book, and I left the premises.

Q. How much did you pay him?

A. Two dollars and fifty cents, plus five cents tax—$2.55.

Q. Now, I show you this book and ask you if that is the book that you purchased that day?

A. Yes.

Mr. Rogers: At this time, your Honor, I would like to enter into a concession with counsel for the defendant.

We have arranged—maybe you better state it, Mr. Schilback.

Mr. Schilback: No. Go ahead.

Justice Perlman: Is there a stipulation with respect to some testimony or proof?

Mr. Rogers: Yes, your Honor.

It is conceded, for the purposes of this trial only, that this defendant sold this book, "Memoirs of Hecate County," on July 1, 1946, in the County of New York;

Secondly, that this defendant, for the purposes of this trial only, published that book on March 7, 1946, as alleged in the information.

[fol. 18] Mr. Schilback: It is so stipulated by the defendant, for the purposes of this case, and for the purposes of this case only.

Justice Oliver: This particular defendant sitting here, or is this——

Mr. Rogers: It is a corporation, your Honor.

Mr. Schilback: The defendant is Doubleday and Company, Incorporated, the publisher of the book.

Justice Perlman: You are also stipulating that the defendant is a corporation, and does transact business in the State of New York, and, particularly, maintained the business conducted at the address given by the witness on the days in question, on the days set forth in the information? Is that the stipulation?

Mr. Schilback: It is so stipulated.

Justice Perlman: This is a book store owned by the defendant—owned and maintained and operated by the defendant?

Mr. Schilback: That is so, your Honor.

Justice Perlman: All right, sir.

Mr. Rogers: Now, your Honors, the book that was purchased has been marked. There are several markings on it. We have agreed that we would offer in evidence a copy that is unmarked. So——

Justice Oliver: Why don't you put the marked copy in?

Mr. Rogers: Well, if the Court would like it, it is all right. I thought it might be better, from the standpoint of evidence, to have an unmarked copy received.

Justice Perlman: Yes. We don't want to read anything that is marked——

[fol. 19] Justice Oliver: I do.

Justice Perlman: —by the People's witnesses.

Justice Oliver: Why not?

Justice Perlman: We have to read the entire book.

Justice Oliver: Well, the point is that the man says, "Here is something which is wrong." He points it out and you look at it.

POOR COPY

BLEED THROUGH

Mr. Schilback: The test, I submit, your Honor, is the entire book. It is not passages that may or may not have been marked after the book was purchased. The test is to read the book from the first word to the last word.

Justice Oliver: I am not objecting to that, but I say this is a lot of triviality—that it shouldn't be marked as the complainant contends. He contends that those passages, I assume, are an essential part of the entire book. I would assume that, or else there isn't any case—if it is just a line and nothing else. We all know that doesn't constitute a violation. But it doesn't make any difference to me.

Mr. Rogers: I thought it might be better from the standpoint of the law.

Justice Perlman: I think, for myself, I would prefer a clean copy, and make my own markings, if I have to. I take it that the District Attorney will, in his memorandum, if he submits any, point out what the People want (not what this witness wants) us to know. We are concerned with what the District Attorney for the People claims to be a violation of the statute. Often this witness's views have [fol. 20] not found any commendation by the Courts. So I would rather take the District Attorney's position.

Mr. Rogers: That is correct, your Honor. We will submit a memorandum at the end of this case. In that we point out the parts that we think are obscene.

Justice Oliver: It is the same thing.

Justice Perlman: That is correct.

Are you stipulating, though, while the book received by this witness may be received in evidence as the book purchased, that the Court has a copy of the book when we read it?

Mr. Schilback: The other copies that will be offered in evidence by the District Attorney, the defendant has no objection to the Court's reading them and using them as though they were the copies purchased by the witness.

Mr. Rogers: They are exact copies, is that correct?

Mr. Schilback: They are identical.

Justice Perlman: What is it—four books?

Mr. Rogers: Three, your Honor. I will offer one in evidence and then submit three.

Mr. Schilback: That is satisfactory to me.

The Court: Received in evidence as People's Exhibit 1.

(The book referred to was admitted in evidence and marked People's Exhibit 1, of this date.)

[fol. 21] Mr. Rogers: No further questions.

Mr. Schilback: No questions by the defendant.

(Witness excused.)

Mr. Rogers: That is the People's case.

MOTION TO DISMISS

Mr. Schilback: The defendant, Doubleday & Company, Incorporated, moves to dismiss the information on the ground, first, as a matter of law, People's Exhibit 1 is not obscene, lewd, lascivious, filthy, indecent, or disgusting, as those words are used in Section 1141 of the Penal Law;

On the further ground that, if Section 1141 of the Penal Law includes in its condemnation People's Exhibit 1, the statute is unconstitutional under Section 6 of the New York State Constitution, guaranteeing liberty of press and liberty of speech;

In addition, if Section 1141 of the Penal Law includes in its condemnation People's Exhibit 1, that the statute is unconstitutional as a violation of the due process clause of the Fourteenth Amendment of the United States Constitution; and

On the additional ground that the People have failed to prove the guilt of the defendant beyond a reasonable doubt.

Justice Perlman: Well, this is just on the prima facie case at the moment. You haven't rested, have you, Mr. Schilback?

Mr. Schilback: No, I have not rested.

The Court: The Court will read the book, and the briefs, if any, to be submitted at this time. We will reserve decision on all your motions.

[fol. 22] Mr. Schilback: May I proceed, your Honor?

Justice Perlman: Yes, you may.

THOMAS R. BURNS, called as a witness on behalf of the defendant, having been duly sworn, testified as follows:

Court Attendant: What is your name?

The Witness: Thomas R. Burns.

Court Attendant: Where do you live?

POOR COPY

BLEED THROUGH

The Witness: 139 East 35th Street, Manhattan.

Court Attendant: What is your business of occupation?

The Witness: I am a Sales Manager for Doubleday & Company.

Mr. Schilback: Your Honors, before proceeding with this witness—this is pursuant to an agre-ment with Mr. Rogers—parts of People's Exhibit 1, particularly pages 300, and 307 to 317, are printed in the French language and not in English. For that reason, to make the book in the record complete in English, we have prepared the translation from French into English of those passages. Mr. Rogers has not read the translation, but we have agreed, I believe, that it may be offered into evidence, subject to correction of any errors that Mr. Rogers discovers.

Mr. Rogers: Yes, your Honor. Someone in our office, who reads French much better than I do, has read it and says there is nothing obscene in those portions; and I am per-[fol. 23] fectly willing to agree that what Mr. Schilback has in here is the correct translation.

Justice Perlman: It is going to be very helpful, because, speaking for myself, I don't read French.

Mr. Schilback: That is why it was prepared—not just for you, but also for the record.

The Court: Under the stipulation, it will be received in evidence.

Mr. Schilback: There are three copies, your Honor. May they all be marked as one exhibit?

(The translations referred to were admitted in evidence and marked Defendant's Exhibits A, A-1, and A-2, respectively, of this date.)

Justice Perlman: Now, Mr. Rogers, do I understand that you have agreed that the portions of the book that are in French are not the subject of your charge—they are not lewd, lascivious, or indecent?

Mr. Rogers: That is correct, your Honor.

Justice Perlman: So we can eliminate those portions from our consideration.

Mr. Rogers: I might say, your Honor, at this time, that it is the contention of the prosecution that the only story in this book that is obscene and lewd is the story called, "The Princess with the Golden Hair"; and that book consists of six separate stories. Now, this one called "The Princess

with the Golden Hair" consumes about half of the book.

Justice Perlman: "The Princess——

[fol. 24] Mr. Rogers: —with the Golden Hair."

Justice Perlman: Now, can we agree on this: that you are submitting to our consideration only that particular story in the book, "The Princess with the Golden Hair?"

Mr. Schilback: To that I and the defendant do not agree. This is one book; it is not six stories.

Justice Perlman: Therefore, the defendant wishes that we read the entire book?

Mr. Schilback: The entire book, including, in English, the translation of the parts that appear as French.

Justice Perlman: All right. I thought we might be able to eliminate a part of the book; but we will read the entire book, then.

Mr. Schilback: May I proceed, your Honor?

Justice Oliver: Yes.

Direct examination.

By Mr. Schilback:

Q. Mr. Burns, what is your business or occupation?

A. Sales Manager for Doubleday & Company, Incorporated.

Q. That is Doubleday & Company, Incorporated, the defendant in this case, is that so?

A. Yes, sir, Yes, sir.

Q. And how long have you been employed by that corporation?

A. More than twenty years.

Q. And has that been a consecutive employment?

A. Excepting for three years in the Navy in World War II; United States Navy.

Q. When were you discharged from the Navy?

A. In September, 1945.

[fol. 25] Q. Shortly thereafter did you return to your employment by Doubleday?

A. Immediately thereafter, yes, sir.

Q. How long have you been the Sales Manager of Doubleday & Company, Incorporated?

A. Approximately fourteen months.

Q. The defendant, Doubleday & Company, Incorporated, is a corporation, is it not?

A. Yes, sir, it is.

POOR COPY

BLEED THROUGH

Q. When was the corporation organized?

A. In 1897.

Q. And has the corporation, although it has had a continuous history, had various names from time to time?

A. Yes, sir, it has.

Q. What are some of the names that it had?

A. It began as "Doubleday, McClure," and later became——

Q. Was that Mr. McClure the publisher of McClure Magazine and other publications?

A. Yes, sir, it was.

Q. Then after that, what?

A. It became "Doubleday, Page."

Q. And was the Page in that Walter Hines Page, who at one time was the Ambassador to England?

A. Yes, sir, the same Page.

Q. What other names has it had?

A. Then it became "Doubleday, Doran."

Q. And now its name is?

A. "Doubleday & Company, Incorporated."

Q. Now, would you tell us a few of the authors for whom Doubleday & Company, Incorporated, have been the American publishers.

A. Rudyard Kipling, Joseph Conrad, O. Henry, Edna Ferber, Stewart Edward White, Somerset Maugham.

Justice Perlman: What is the purpose of this offer?

[fol. 26] Mr. Schilback: This is merely a description of the corporate defendant. It is a defendant on trial.

Justice Perlman: You want to show the reputation of the corporation?

Mr. Schilback: No, not the reputation. It is just what the corporation is.

Justice Perlman: You are now trying to offer proof of what they have published in the past.

Mr. Schilback: It is merely a description of the corporation, your Honor. I will shorten it if you want me to.

Justice Perlman: I don't know what is the value of it, because we are not trying the reputation of this corporation.

Q. Now, would you tell us approximately how many volumes, separate volumes—not titles, but how many separate volumes are published by Doubleday & Company, Incorporated in the course of a year.

A. Between 24,000,000 and 36,000,000.

Q. That is separate volumes?
A. Yes, sir, units.
Q. Now, approximately how many titles?

Mr. Rogers: Your Honor, I object to any further questioning along this line. I think that Mr. Schilback has established that it is a reputable concern.

Mr. Schilback: I thank you for the concession.

The Court: Well, we will give him some latitude here. Overruled at the moment; but don't let's have too much of that.

Mr. Schilback: I am almost through with it, now.

Justice Perlman: All right.

[fol. 27] (The Court Stenographer repeated the last question as follows: "Q. Now, approximately how many titles?")

The Witness: It is over 300 titles a year.

By Mr. Schilback:

Q. Now, I show you People's Exhibit 1 and ask you if that is a book published by Doubleday & Company, Incorporated?
A. Yes, sir, it is.
Q. When was that book published by Doubleday & Company, Incorporated?
A. March 7, 1946.
Q. Now, what was the original or first printing of that book, how many volumes?
A. Ten thousand copies.
Q. Are ten thousand copies as a first printing a high, low, or ordinary first printing?
A. A low.
Q. Now, will you tell me how People's Exhibit 1 and all the other copies of "Memoirs of Hecate County," by Edmund Wilson, were sold by Doubleday & Company, Incorporated.
A. They were sold in the same manner as the rest of our publications to recognized book shops, department stores, and other recognized dealers in books, sold by our salesmen.
Q. And in your sales to these stores and other customers, was it sold in precisely the same manner as any other book published by Doubleday?
A. Yes, sir.

POOR COPY

BLEED THROUGH

Q. I now show you—well, preliminarily, are you familiar with the advertising that Doubleday & Company, Incorporated, used in connection with the sale and distribution of this book?

A. Yes, sir.

Q. I show you four pieces of paper and ask you if you recognize those as advertisements bought and paid for by the defendant?

A. Yes, sir.

[fol. 28] Mr. Schilback: I think I said four. There are five.

Q. Could you tell me the publication and the day of this first advertisement?

Mr. Rogers: Your Honor, at this time I want to interpose an objection just for the record, that this advertising is not material to this issue. The question here is just whether this book is obscene or not, and I don't see how the advertising will assist the Court in any way in determining that question.

Justice Perlman: What is your point, Mr. Schilback, on that?

Mr. Schilback: The point, your Honor, is this: Some of the cases have held that the manner of distribution, and the manner of sale, and the manner of advertising by the defendant is an element to be taken into consideration. For example——

Justice Perlman: Yes. What case do you refer to?

Mr. Schilback: One of the cases, your Honor, is Halsey *v.* The Society for the Suppression of Vice, in 234 New York, at page 1.

Justice Perlman: Are you going to submit a memorandum?

Mr. Schilback: Well, the me-orandum will not take up in detail that specific point.

Justice Perlman: We are perfectly willing to overrule the objection, provided that you will, in your memorandum, brief the question of the admissibility of this testimony.

[fol. 29] Mr. Schilback: We shall submit an additional memorandum, your Honor.

Justice Perlman: All right. Because I myself have some doubt as to whether you have any right to offer advertisements here in connection with a charge that the book is

obscene. But we will overrule the objection at this time; and Mr. Schilback says he will refer us to some decision. I have my doubts whether one——

Mr. Rogers: Your Honor, may I just make one statement? I have read the cases, and the Halsey case that Mr. Schilback refers to, and nowhere have I seen any element of intent. The test is objective—is this book obscene?—and there is no element of intent required in the statute.

Mr. Schilback: There is no element of intent, but, for instance, cases hold that if a book is sold surreptitiously, under the counter and behind closed doors, that that may be taken into consideration. I think, likewise, the fact that a book was sold publicly, openly, by advertisement, in the normal course of business, it is the same element.

Justice Perlman: Now, that, likewise, is that your addition, or is it in the case? I couldn't understand——

Mr. Schilback: No, I know——

Justice Perlman: —the first point that you made.

Justice Oliver: That is Schilback on Evidence.

Justice Perlman: Yes.

[fol. 30] Mr. Schilback: Now, I shall say this: I know of no case that squarely rules on advertisements; but there is language in cases that says the manner of sale, the type of sale, the manner of advertising is an element to be taken into consideration.

Justice Perlman: If it is furtive, if it is a furtive transaction, one might consider that on the question of whether or not the book really is obscene and within the knowledge, within the knowledge of the defendant. But, now you want to offer the reverse of that: If a person, even if the book may be obscene, openly, without any concealment, sells it to the public, that that changes the character of the writing in the book.

Mr. Schilback: No. You see, your Honor, you are dealing with a New York statute, which does not require intent; but even in that situation they permit evidence of furtiveness, which really has nothing to do with the statute.

Justice Perlman: Well, we are going to take it only because you assure us that you are going to offer some memorandum on that question. We will take it and have in mind, if we come to the conclusion that you are wrong on the law, we shall give it no weight.

Mr. Schilback: All right.

POOR COPY

BLEED THROUGH

Justice Perlman: All right.

Mr. Schilback: Now, I shall submit at the close of the case today a memorandum which does not cover that point; but within the next day or two I shall have a special memorandum prepared on that point.

[fol. 31] Justice Perlman: Because of other business, we probably will take a whole month before we can read the entire book. There is some other more important reading we have to do.

Mr. Schilback: I offer these five advertisements in evidence.

The Court: Received in evidence.

(The advertisements referred to were admitted in evidence and marked Defendant's Exhibits B, B-1, B-2, B-3, and B-4, respectively, of this date.)

Justice Perlman: I hope that when you do submit your memorandum on this question, you will have copies of these advertisements as well.

Mr. Schilback: All right. I shall, sir.

Justice Perlman: Because we will go to different parts at the end of this week——

Mr. Schilback: Yes.

Justice Perlman: —and it will be difficult to read these advertisements.

Mr. Schilback: All right.

Now, the next subject is along the same line, and for that reason I shall proceed slowly.

Q. Has there been prepared by Doubleday & Company, Incorporated, a list of the various colleges, universities, and public libraries that purchased this book?

A. Yes, sir.

Q. And that list shows purchases made by those universities, colleges, and libraries on direct order from Doubleday & Company, Incorporated?

A. Yes, sir.

[fol. 32] Q. Will you tell me how many of those institutions, colleges, universities, and libraries purchased the book on direct order from Doubleday & Company, Inc., and state what period of time you cover.

Mr. Rogers: Your Honor, I object to that. Certainly this is far afield. There is no evidence that people who purchase this book, ever read it or know anything about

it; and even if they did, the fact that they considered it not obscene can in no way influence this Court. I can submit a list of a lot of institutions that would not purchase the book.

Justice Perlman: Well, Mr. Schilback, what do you say about that? Are we, then, to determine this case on how many libraries will take the book or how many will not take it; or how many universities or colleges will take it, and how many will not? I think the sole test here for the Court is, after reading the book, to decide whether or not it is lewd or in any way condemned by the Penal Law; and it wouldn't matter, so far as I am concerned, whether every library in the country took the book; if I came to the conclusion that the book was lewd and obscene, I would be obliged to say guilty. Now, how does the fact that you have libraries getting these books—I have no doubt that curiosity will lead many people into libraries, and I don't know whether librarians ever read all the books that come in, and I have my doubts whether the deans and the presidents of colleges ever read all the books that are in the hands of their scholars.

[fol. 33] Mr. Schilback: I should be very happy if we could tell your Honor that I think this is determinative. I cannot. But I do think that it is something which may be considered in evidence by this Court as to the type book that "Memoirs of Hecate County" is, the type audience to whom it appealed; and the fact that if purchased by this list of universities and libraries, it is a book which is really a sincere, serious work of literature. Now, the courts have made the distinction that a book which is serious, which is sincere, is different from a book which is just smut for smut's sake, and written for only one purpose—the purpose of being dirty and filthy.

Now——

Justice Perlman: I don't want to test the sincerity——

Mr. Schilback: No, I am not saying it is sincerity, your Honor.

Justice Oliver: I was just going to enlighten my associate with a statement that perhaps the colleges read these very fine advertisements. Here's one: "The first event of the year which can be described as literary."

POOR COPY

BLEED THROUGH

Mr. Schilback: That is from Time Magazine, your Honor.

Justice Oliver: Yes. I say, perhaps your advertisements got these people to buy them; then what they thought of them after they bought them, we don't know. But the logic of your position is they bought them on your advertisements and, therefore, the book [fol. 34] is all right. I don't think it is going to weigh very heavily with me whether they did or didn't——

Mr. Schilback: I am not saying it is determinative.

Justice Oliver: —they are such good advertisers. I buy a book because of an advertisement and then I say, "Holy smoke, how did I ever get stuck with that thing!"

Mr. Schilback: Does your Honor sustain the objection?

Justice Perlman: We can't really substitute the judgment of librarians, or even college professors, for the duty which we have, to determine whether this book is condemned by the statute.

Mr. Schilback: I am not offering that as final.

Justice Oliver: You haven't submitted to us what the librarians and the college professors think of the book. You tell us that they bought it, but you don't tell us what they say about it.

Justice Perlman: Well, I take it that you think we can draw an inference from the fact that a large number of outstanding universities and colleges and libraries have accepted this book.

Mr. Schilback: That's right.

Justice Perlman: Then the inference you want us to draw is they would not have accepted it unless they had read it; and the next inference on inference is that, after they read it, they said it was all right. Such evidence, I think, for myself, is highly incompetent.

Mr. Schilback: Do your Honors sustain the objection? [fol. 35] The Court: Objection is sustained; you have an exception.

Mr. Schilback: Exception.

Now, I shall ask—this is not any violation of the Court's order——

Justice Perlman: No, no, Mr. Schilback——

Mr. Schilback: —but there is a possibility, in view of what Judge Oliver said——

Justice Perlman: —make your record as clearly as

possible. For your sake and your client's sake, we hope the record will stay right in the Court of Special Sessions; but no one can tell what may happen after we read this book.

Mr. Schilback: I shall ask one further question, your Honor.

Justice Perlman: Go ahead. You ask questions.

By Mr. Schilback:

Q. From your schedule, did any of these universities and libraries, after purchasing the book, subsequently reorder one or more additional copies?

Mr. Rogers: I object to that, your Honor.

The Court: Same ruling; sustained; you have an exception.

Mr. Schilback: May I state, merely for the record, the purpose of asking that was in answer to Judge Oliver's statement that maybe they bought it on our advertisement. I want to prove that even if they bought the first copy that way, they did not buy subsequent copies of it——

[fol. 36] Justice Oliver: That would have some sense to it, to my way of thinking. That is a matter of evidence, but it is not very essential.

Mr. Schilback: You sustain the objection?

Justice Oliver: We are not going to pass on the impressions of professors or librarians. We are going to pass on the book.

Mr. Schilback: Has the objection been sustained?

The Court: Yes, sustained; you have an exception.

Mr. Schilback: Exception.

That is all with this witness.

Mr. Rogers: No questions.

(Witness excused.)

Mr. Schilback: This, your Honor, is in answer to one of the other things you mentioned—I should call librarians and professors.

POOR COPY

BLEED THROUGH

LIONEL TRILLING, called as a witness on behalf of the defendant, having been duly sworn, testified as follows:

Court Attendant: What is your name?
The Witness: Lionel Trilling.
Court Attendant: Where do you live?
The Witness: 620 West 116th Street.
Court Attendant: What is your business or occupation?
The Witness: I am a teacher at Columbia University, and a writer.

[fol. 37] Direct examination.

By Mr. Schilback:

Q. What position, Professor, do you now have at Columbia University?
A. I am Associate Professor of English.

Justice Perlman: I think you will have to raise your voice.
The Witness: I am sorry. I am Associate Professor of English.

Q. And how long have you been Associate Professor of English at Columbia?
A. Well, as Associate Professor, I have had my associate professorship for about two years. I taught at Columbia University since 1932.
Q. Now, what college degrees do you have, and from what colleges, Professor?
A. I have my Bachelor of Arts degree from Columbia; my Master of Arts degree from Columbia; and my Doctor of Philosophy from Columbia.
Q. Have you taught at any institution other than Columbia University?
A. Yes. I have taught at the University of Wisconsin, and at Hunter College in New York City.
Q. Now, in addition to your teaching duties at Columbia, you stated, I think, that you were a writer?
A. Yes, sir.
Q. Will you tell us what type writing you have done in the past?
A. Well, I have written two books—one on the English Critic, Matthew Arnold, and one on the English Novelist, E. M. Forster. I have written a good many reviews for various critical journals such as The Nation, The New Republic, The Kenyon Review, New York Times, and so on.

[fol. 38] Q. These two books—the one on Matthew Arnold and the one on E. M. Forster—are books on or about literature, are they not?

A. Yes.

Q. Literary criticism and a study of literature, isn't that so?

A. Yes, sir.

Q. And these criticisms and reviews that you have written for The New York Times and other publications are on current literature?

A. Current literature and past literature.

Q. Now, do you have any connection with The Kenyon Review?

A. Yes. I am a supervisory editor of The Kenyon Review.

Q. And will you just tell us very briefly what The Kenyon Review is.

A. The Kenyon Review is a quarterly journal of criticism on literature, published at Kenyon College in Ohio, which deals with matters of general literature and specific problems and criticisms.

Q. And I will ask you—after all, you are connected with it—it is a publication of substantially high standing in the literary world, is it?

A. Yes, I believe it is.

Q. Now, in addition to that, have you been connected with the series called the "American Men of Letters"?

A. Yes, sir. I am one of the four editors of the new series called the "American Men of Letters," published by Henry Holt & Company.

Q. And, just briefly, what is the series, "American Men of Letters?"

A. Well, that is a series of biographies of American writers, based more or less on the analogy of the "English Men of Letters," which was published in the Nineteenth and Twentieth Centuries, which is to give in brief and relatively simple but sound literary form, a knowledge of American Literature to the general reader.

[fol. 39] Q. Now, you stated that you were one editor of several. Would you name the other editors?

A. Well, one is Miss Margaret Marshall, the literary editor of The Nation; one is Professor Joseph Wood Krutch; and one is Professor Mark Van Doren.

POOR COPY

BLEED THROUGH

Q. Now, have you read a book, which has been marked in evidence as People's Exhibit 1, a copy of which I show you, which is entitled, "Memoirs of Hecate County," written by Edmund Wilson?

A. Yes, I have.

Q. When did you first read that book?

A. I think I read it shortly after its publication, back in March, possibly in April.

Q. The publication date was March 7. Would you say that you read it within a month or six weeks thereafter, anyhow, at the most?

A. Oh, yes; rather less than that.

Q. And, of course, at the time you read it, this trial had not started or this case had not started. You did not read that book originally in connection with appearing as a witness on any trial?

A. No, sir.

Q. You had never heard of any proceeding against this book?

A. No, sir.

Q. And you didn't anticipate it?

A. No, sir.

Q. So that you read it merely in the course of your general reading, without any specific connection with this trial?

A. Oh, yes.

Q. Now, are you familiar with the literary reputation of the author of that book, Mr. Edmund Wilson?

A. Yes, I am very familiar with it and have been for a good many years.

Q. Will you tell me what the reputation of Mr. Wilson is in the field of literature?

Mr. Rogers: Your Honor, I object to that as not relevant to this issue.

[fol. 40] The Court: Without passing on its materiality—overruled.

(The Court Stenographer repeated the last question as follows: "Q. Will you tell me what the reputation of Mr. Wilson is in the field of literature?")

A. Well, I can begin by saying it is very high. It is difficult to estimate those things, but I would say that he is a literary critic. Mr. Wilson is the best known American literary critic in this country, as well as abroad—in England

and in France; and his reputation in literary circles, general reading public, and academic circles is very high, perhaps higher than any other one critic.

Q. Now, are you familiar with the past works by Mr. Wilson and by "past works" I mean prior to "Memoirs of Hecate County"?

A. Yes, sir. I think I have read them all.

Q. Now, have any of those past works of Mr. Wilson's, to your knowledge, been used as part of any literature courses given in this country?

Mr. Rogers: I object to that as going pretty far afield.

Justice Perlman: Well, if you want to add to the reputation of Mr. Wilson, we have no objection to your doing it.

Mr. Schilback: Thank you.

Justice Perlman: It isn't going to make much difference in the final outcome of this case, because, speaking for myself, the best of authors may write books that are lewd and filthy. They may think they are not. We have to make the decision.

[fol. 41] Mr. Schilback: That is so, your Honor.

The Court: Overruled.

(The Court Stenographer repeated the last question as follows: "Q. Now, have any of those past works of Mr. Wilson's, to your knowledge, been used as part of any literature courses given in this country?")

A. Yes, sir, I know that they have. Most immediately to my knowledge, I have used them myself—two of them.

Q. In connection with the courses in literature that you give?

A. In connection with the courses that I have given.

Justice Perlman: That includes Columbia University?

The Witness: That includes Columbia University.

Justice Perlman: Hunter College?

The Witness: No, sir; only Columbia University. I didn't recommend the books when I was at Wisconsin or at Hunter College.

Justice Perlman: I just wanted to know because what you mean is that these books are used in courses given at the best colleges and universities in the country.

Mr. Schilback: That is right, your Honor.

POOR COPY

BLEED THROUGH

Justice Perlman: Because there may be some institutions, that have not the same reputation as Columbia, that might be using some books that Columbia would not use.

Mr. Schilback: But Columbia, among others, does use those books.

Justice Perlman: All right.

[fol. 42] Q. Now, coming to People's Exhibit 1, which is "Memoirs of Hecate County," by Edmund Wilson, will you tell us what, in your opinion, is the meaning of the book, the theme of the book, the literary significance of the book.

Mr. Rogers: Your Honor, I think this is improper, but I have no strong objection to it. I think the Court has to decide those facts.

Mr. Schilback: The only evidence I am submitting is evidence to influence the Court. If I could find one question that determined this case finally, I would ask that question and nothing else. I don't know that question.

Justice Perlman: Apparently there is no objection to it, so that we don't have to rule on it.

(The Court Stenographer repeated the last question as follows: "Q. Now, coming to People's Exhibit 1, which is 'Memoirs of Hecate County,' by Edmund Wilson, will you tell us what, in your opinion, is the meaning of the book, the theme of the book the literary significance of the book.")

Justice Perlman: Shall we divide that into three questions? It might be helpful.

Mr. Schilback: I will let the witness take it any way he wishes.

Justice Perlman: First, what is the meaning of the book?

The Witness: May I answer all three as one?

Justice Perlman: Suit yourself. You think that is going to enlighten us?

[fol. 43] The Witness: I think it will.

Justice Perlman: All right. You may answer.

The Witness: Well, the book can be described in many ways. It seemed to me to be—I think we can begin by saying that it is a largely satirical work, which undertakes to characterize the quality of modern culture and modern civilization in several groups, literary groups—the way people act, feel, think—and it makes a rather stern and severe judgment on what is happening in our modern cul-

ture. The figure of the devil appears frequently in the book—sometimes as a political character, sometimes as a literary character, but always as a functioning character. Sometimes he appears not merely as a character, but in one case (the story called, "The Princess with the Golden Hair") is a neurotic manifestation of one of the characters. This figure of the devil runs, I think, through the whole book; and the devil represents forces of egoism, pride, vulgarity, surrender of moral integrity.

And then, I think, from that point on, I would have to be—rather, I would have to move on to perhaps the literary method of the book, which is a satirical method, a method of rather Swiftian representation of manner, of conversation, of ideals or the lack of them, and all to the intention of inducing in the reader a sense of disgust with all he is likely to find around him in his life.

Shall we go further? I think I have more or less said what I think the intention of the book was.

[fol. 44] Justice Perlman: Will you explain to me, Professor—I heard you say something about the figure of the devil as a character in this book.

The Witness: Yes.

Justice Perlman: I heard you say something about the way of life today, and then you talk about politics, and you talk about culture. Now, will you tell us how the figure of the devil in any way ties up with politics and culture.

The Witness: You mean both?

Justice Perlman: In this book. Either politics or culture.

The Witness: Well——

Justice Perlman: We are near election, and it is a good time to learn how the devil can be tied up with culture.

The Witness: In one of the stories, I think it is called "Mr. and Mrs. Blackburn at Home," the devil appears as a host, a man of considerable wealth, who appears in various guises, and his name appears in different languages, all of them some variation of the work "black." In English he is "Blackburn," I think; in German he is "Schwarzkopf," I think, something like that. He takes many forms, and his wife is a kind of female devil.

Justice Perlman: Do we change the color of the devil from red to black in this book?

The Witness: Yes, he is a black devil, with certain red aspects. He is a—well, he is a seducer of the minds and the integrities of men, as all devils are. He is suggestive.

POOR COPY

BLEED THROUGH

[fol. 45] He talks in French in this particular story, which is to perhaps suggest his rationalistic and vaguely immoral background.

In another story, I think it is called "The Milhollands and Their Damned Soul," the devil works a terrible revenge, or the devil buys souls, very much as in the Stephen Vincent Benét story.

Justice Oliver: Are you explaining the book or telling us a story?

The Witness: I am sorry, sir.

Justice Perlman: Well, I mean, that is your interpretation of the devil in the book, and the culture, and all that.

The Witness: Yes. The devil is but one symbol that is used throughout the book.

Justice Perlman: You can see how important it is for us to read this book and to get the whole idea of what the author is telling the public.

The Witness: Yes, indeed; I do.

Justice Perlman: And not everybody is a Professor.

The Witness: Yes.

Justice Perlman: And the average person on the street hasn't the same high motives or high instincts that Professors have. So we have to protect, not just the Professors, who don't need protection, but the average man on the street.

Go ahead, Mr. Schilback.

By Mr. Schilback:

Q. Now, from your reading of the book, and just from the book itself, as you read it, would you say, in your opinion, that this is a serious work of literature?

A. Yes, indeed.

[fol. 46] Q. In your opinion, is it a dirty book, written just to be dirty?

Mr. Rogers: I object to that, your Honor.

The Court: Sustained. That is our province.

Mr. Schilback: I did not hear you, sir.

Justice Perlman: That is our province.

Mr. Schilback: I know it is, but I thought maybe he could testify as an expert without binding the Court.

I take an exception to your Honor's ruling.

Justice Perlman: Any evidence that is received here must influence the Court, otherwise we wouldn't take it.

You have an exception.

Mr. Schilback: (To witness) don't answer this until the Court rules.

Justice Perlman: Go ahead.

Q. From your reading of the book, in your opinion, is this a book which, taken as a whole, from beginning to end, would tend to excite lustful and lecherous desires in the mind of the average, normal, reasonable man?

Mr. Rogers: Same objection, your Honor.

The Court: Sustained.

Mr. Schilback: Exception.

No further questions.

Cross-examination.

By Mr. Rogers:

Q. Professor Trilling—is that the name?

A. Yes.

Q. Did you read this book after you had decided to come here as a witness?

A. Oh, naturally.

[fol. 47] Q. In other words, you read it once and then you read it again for the purposes of this trial?

A. Yes.

Q. Now, I call your attention to the fact that there are six separate stories here, and the book delineates the six separate stories. You notice that part of it?

A. Yes, of course.

Q. And you notice that the first three stories in the book were published, according to the acknowledgement in the book itself, in different magazines—the Atlantic Monthly, the Partisan Review, the Town and Country. Did you, by chance, read those stories in those magazines?

A. I read one, the "Ellen Terhune" story, in the Partisan Review.

Q. Now, there is very little connection, isn't there, between those three stories and the last three stories?

A. The first three are which?

Q. The first three stories and the last three stories.

A. Not one; the first three.

Justice Oliver: Here, Professor——

The Witness: I have the book.

POOR COPY

BLEED THROUGH

Justice Oliver: —take a look at it. There is the table of contents there.

The Witness: Well, "very little" is very difficult to judge. I would say that perhaps there was more connection between the last three among themselves than there is among the first three among themselves.

Q. Well, let me put it another way. I am sorry. Go ahead.

A. But I would say there is a connection of theme and character that runs through six of the stories.

Q. You would acknowledge, however, that obviously they are not continued because they appeared in three different [fol. 48] magazines at three different times?

A. No, sir.

Mr. Schilback: That is objected to as argumentative.

Mr. Rogers: Well, I am cross-examining the witness.

Mr. Schilback: It is argumentative.

The Court: Overruled.

Mr. Schilback: Exception.

Q. Isn't that so?

A. No, sir, I would not.

Q. I see.

A. Because it is common literary practice——

Mr. Schilback: May the witness be permitted to continue his answer?

Mr. Rogers: It just called for a yes-or-no answer, your Honor.

Justice Perlman: He has answered.

Mr. Rogers: He said, "No."

Mr. Schilback: Exception.

Q. Now, the first three stories—in fact, all stories are in the first person; that is correct, is it not?

A. Yes, sir.

Q. And in the first three stories there are no characters that run through all of them, are there?

A. Well, there is the "I" who runs through all of them.

Q. The first person, as all of them are; it is in the first person; but other than that there are no characters that appear in one story and then subsequently appear in one of the other first three stories?

A. That I am not sure of. I believe that there is one character named Joe.

[fol. 49] Justice Perlman: The devil, is that a character?

The Witness: Yes, one is called the devil in character.

Justice Perlman: Well, isn't that character in each of these six stories?

The Witness: That would be hard to say, that he appears as a character in each of the six. I would want to refresh my memory on that; but, it seems to me, that as a character he does not appear in all six, though he is referred to in all six.

Q. Now, you notice that "The Princess with the Golden Hair" consumes almost half the book, is that correct? 158 pages, to refresh your recollection; is that about right?

A. Well, that is a mathematical computation.

Q. And the first three stories appeared sometime before "The Princess with the Golden Hair" appeared in print, as far as you know?

A. Yes.

Q. Now, you testified in answer to Mr. Schilback's question that this book had literary significance, is that correct?

A. Yes, sir.

Q. Now, I just want to read a couple of parts here and ask you if you feel that the parts that I read are necessary to assist the book in being of literary value. To read on page 190; you can refer to it, if you like; where the character of the writer, who is speaking in the first person, has Imogen Loomis undressed and he is explaining how she looks: "But what struck and astonished me most was that not only were her thighs perfect columns but that all that lay between them was impressively beautiful, too, with an ideal aesthetic value that I had never found there before. [fol. 50] The mount was of a classical femin-ity: round and smooth and plump; the fleece, if not quite golden, was blond and curly and soft; and the portals were a deep tender rose like the petals of some fleshy flower. And they were doing their feminine work of making things easy for the entrant with a honey-sweet sleek profusion that showed I had quite misjudged her in suspecting as I had sometimes done that she was really unresponsive to caresses. She became, in fact, so smooth and open that after a moment I could hardly feel her. Her little bud was so deeply imbedded that it was hardly involved in the play, and she made me arrest my movement while she did something special and gentle that did not, however, press on this point, rubbing herself some-

POOR COPY

BLEED THROUGH

how against me—and then came, with a self-excited tremor that appeared to me curiously mild for a woman of her positive energy. I went on and had a certain disappointment, for, with the brimming of a female fluid, I felt even less sensation; but—gently enough—I came, too."

Now, do you feel that that type of writing adds to the literary merit of a book?

A. That is a difficult question to answer. If I had to answer it yes, or no, I would say yes; not making an abstract principle of "that kind of writing," because I don't quite know how you are characterizing "that kind of writing." If you would characterize it as a rather precise and literal account of a woman's sexual parts in the sexual act, and if you would go on to admit that the story is about sexuality, then I would say yes, it added to the accuracy, precision of the story.

Q. Well, I will read another part, on pages 159 and 160: He has the same woman again, Imogen. Let's see. I will [fol. 51] start here: "I remember one cold winter Sunday when she came in the afternoon—"

A. I am sorry. Where is that?

Q. That is on page 159—

A. At the bottom. I see.

Q. —at the bottom of the page. "—she had come in the afternoon, a day of blank uptown facades and decorous uptown perspectives, when I had gone to the deserted museum to look something up in a book, and, returning, it seemed so incongruous to watch her take off her stiff pink slip and to have her in the prosaic brassiere; the warm and adhesive body and the mossy damp underparts—the mystery, the organic animal, the prime human oven of heat and juice—between the cold afternoon sheets in the gray-lit Sunday room; and one evening when I had come home from a party, at which I had made Imogen smile by my tender and charming gallantries and had kissed her hand at parting, and had made *to* love to Anna for the second time, by a sudden revival of appetite after she had put on her clothes to go, by way of her white thighs and buttocks, laid bare between black dress and gray stockings—she was so slim that it was almost as easy to take her from behind as face to face—while she kicked up one foot in its blunt-toed black shoe as a gesture of playful resistance or simply wanton freedom."

Now, do you think it is necessary to describe people's movements and parts of sex organs to make a book a great book?

A. Literary necessity is very hard to define. In a certain sense, nothing is necessary and everything is necessary. What is necessary is what it is that will give the effect that the writer intends. Here, I take it, he wants to contrast his vulgar—what is outspoken, with what he is calling "tender [fol. 52] and charming gallantry," and his point can't quite be made, perhaps, unless he put one thing against another.

Q. Do you think the great books of literature, the great love stories, say, "Scarlet Letter," have suffered because they haven't had a detailed description of sex acts and sex organs?

A. I don't quite think this is a love story. I think this is a story of sexuality, which is a different thing.

Mr. Rogers: I have no further questions.

Redirect examination.

Mr. Schilback:

Q. These passages that Mr. Rogers read to you and asked you if they were necessary to the book: Let me phrase it a little differently. Do you find a real relationship between those passages and the rest of the book?

A. Oh, yes, indeed.

Q. Now, as to the use of the word "necessary": I should think, going through any book, no word or no sentence is absolutely necessary, is it?

A. No, not necessary to get the general gist of the intention; otherwise, we would not make any sense of what appears, let's say, in a reader's digest boiled down from a large book. We do make sense of it and, I suppose, it could be argued that all the words thrown out are not necessary.

Justice Perlman: Well, the writer determines what is necessary.

The Witness: I beg your pardon?

Justice Perlman: The writer, the author.

The Witness: It seems to me the writer determines it by his intention.

Q. And the test which other persons can make is not "necessity," but whether there is a relationship between

POOR COPY

BLEED THROUGH

[fol. 53] the individual passages and what the book as a whole is tending to establish, is that so?

A. Yes, and on that——

Q. You do find such a relationship?

A. Oh, yes.

Q. Now, would you say that, not passage by passage, but, taking the book as a whole, the effect of almost everything is necessary to that book?

A. Yes.

Q. Now, you were asked whether you re-read this book prior to coming to Court, and you said you did. When I first saw you, you had already read the book, without any connection with this trial?

A. Yes.

Q. And at that time were your opinions the same as they are now, after a second reading of the book?

A. Oh, yes.

Q. Now, you stated that the devil appears in this book from time to time, and I think there may be some confusion. I think in only one part does the devil appear identified as the devil, isn't that so, when he makes a speech?

A. As a physical character, that's right.

Q. That is right, as a physical character. The other appearances of the devil—maybe we can use the word "symbolism"; some other character or person is used——

A. By his effects; by his effects.

Q. By his effects. In other words, characters who were given names other than "Mr. Devil," are, in effect, conducting the work of the devil and representing the devil, is that so?

A. Yes.

Q. So that your testimony is not that the devil appears repeatedly identified as "Mr. Devil," except——

A. No.

Q. Except by symbolism, is that so?

A. Yes.

Q. Now, Mr. Rogers asked you if these were six separate stories. Will you tell me, in connection with all six, whether [fol. 54] there is a common theme running throughout the entire book, from the beginning to the end?

A. Yes, there is a common theme.

Q. And will you tell me what the theme is?

A. The theme that runs through all the stories is the theme of the corruption, of the defeat of what is good and the corruption of what is pure; and with integrity, and the increasing ease with which vulgarity and mendacity have become available to people in our culture.

Q. Now, in your opinion, is the theme of this book a moral theme or an immoral theme.

Mr. Rogers: I object to that, your Honor.

The Court: Overruled. We will take it.

Justice Perlman: Is the theme moral or immoral?

The Witness: The theme is very moral.

Q. Very moral?

A. Very moral.

Q. Mr. Rogers read to you some isolated passages from the book. In many of the great books of this world, including classics, could you go to many of them and take from those books a passage here and a passage there, which, standing all alone, might seem to tend to create lecherous desires, or be obscene, or be indecent?

Justice Perlman: Mr. Schilback, I have held we must not take any one isolated sentence or paragraph.

Mr. Schilback: All I am asking——

Justice Perlman: So we need not have the opinion of the Professor on that. We are obliged to follow that as the law, as I see it.

[fol. 55] Mr. Schilback: I think that is the law; and if the Court is so ruling, then I do not have to ask the question.

Justice Perlman: That is the law. We can't take one passage alone.

Mr. Schilback: No further questions.

Mr. Rogers: No further questions.

(Witness excused.)

Mr. Schilback: The defendant rests.

Mr. Rogers: The People rest, your Honor.

Mr. Schilback: Shall I make my motions now, your Honor?

Justice Perlman: Yes.

Motion to Dismiss

Mr. Schilback: The defendant at this time moves to dismiss on the ground, first, that People's Exhibit 1 is not

POOR COPY

BLEED THROUGH

obscene, lewd, lascivious, filthy, indecent, or disgusting as those words are used in Section 1141 of the Penal Law;

On the further ground that, if Section 1141 of the Penal Law is interpreted so as to include People's Exhibit 1, "Memoirs of Hecate County," it is unconstitutional under both the New York State and the Federal Constitutions; that in those Constitutions, without limiting the motion to particular sections, it is unconstitutional under Section 8 of the New York State Constitution and in violation of the due-process clause of the Fourteenth Amendment to the Federal Constitution; by mentioning those sections, I do not limit it merely to those, but I specify those.

In addition, the defendant moves to dismiss on the ground that the People have failed to prove the guilt of the defendant beyond a reasonable doubt;

[fol. 56] In addition, the People have failed to prove the allegations of the two informations which have been consolidated, beyond a reasonable doubt.

The Court: We will reserve decision on all your motions.

COLLOQUY

Justice Perlman: Now, Mr. Schilback, I think that we would like at least a month to finally make a decision in this case; not that we will need that long, but we won't reach it much before two weeks from now. By that time, some of the testimony that we have had here today may be forgotten by us; and it would be very helpful if you would let us have a copy of the stenographer's minutes of today.

Mr. Schilback: Would your Honors be satisfied with one copy or do you want three?

Justice Perlman: One copy.

Mr. Schilback: All right. We shall certainly provide a copy.

Justice Perlman: And the amendment. We have the briefs. Those we would like to have——

Mr. Schilback: I have briefs which I can submit now, which include almost everything except the one point that was raised today; and if I may have a little time, I will submit on that.

Justice Perlman: Well, would you like to have one brief to cover all these points, or would you like to submit a supplemental brief?

Mr. Schilback: The brief that I now have is printed. So I think the supplemental one will not be—— May I approach the bench?

Justice Perlman: Yes.

(Discussion off the Record.)

Justice Perlman: Let's do this: All briefs to be in by the 12th of November, the day after Armistice Day. Is that enough time?

[fol. 57] Mr. Schilback: Complete.

Mr. Rogers: Yes.

Justice Perlman: And then we will render our decision on November 27, the day before Thanksgiving. That will be just about the right time to pass on this.

Mr. Schilback: Judge, do you desire any argument now, or at that time? I don't care——

Justice Perlman: Whenever you want your argument—you can argue it now or in your brief.

Mr. Schilback: I mean oral argument.

Mr. Rogers: I don't care.

Justice Perlman: I don't think we need any oral argument. November 12. We have some briefs now from the defendant, and we will take all other briefs on the 12th, and we will read the book. We won't need copies of the advertisements.

Mr. Schilback: You will not?

Justice Perlman: No.

Mr. Schilback: If you do, I can get them.

Justice Perlman: We will get together. That won't be necessary.

Reporter's Certificate to foregoing transcript omitted in printing.

POOR COPY

BLEED THROUGH

[fol. 58] In Court of Special Sessions of the City of New York, Part VI—New York County

The People of the State of New York

against

Doubleday & Co., Inc., Defendant

Calendar Nos. 1, 2; Info. Nos. 2721, 2722
Giving Information as to How to Obtain Obscene Book, and Publishing Obscene Book

Selling Obscene Book

Decision

New York, N. Y., November 27, 1946.

Before Hon. Nathan D. Perlman, Justice Presiding; Hon. Frank Oliver, Hon. William A. Farrell, Associate Justices

Appearances:

For the People: William P. Rogers, Esq., Assistant District Attorney, New York County.

For the Defendant: Messrs. Satterlee, Warfield & Stephens, 49 Wall Street, New York, N. Y., by James F. Dwyer and Milton Schilback, of Counsel.

[fol. 59] Mr. Rogers: Numbers 1 and 2.

Court Attendant: For Decision, Number- 1 and 2, Doubleday & Company, Incorporated.

Justice Perlman: Are we all ready?

Mr. Rogers: Yes.

Mr. Schilback: Ready.

Justice Perlman: The motions have been made, I gather. There are two motions before the Court—no, I don't think we passed upon the motion made at the end of the People's case; you reserved decision on that.

Mr. Schilback: That is so, your Honor.

Justice Perlman: And now you have a motion made at the end of the entire case not only that the People have failed to establish a case, a *prima facie* case, but also the guilt of the defendant has not been established beyond a reasonable doubt.

Mr. Schilback: That is so, your Honor.

Justice Perlman: Those are the motions that have been made. By a majority of the Court all motions to dismiss and to acquit are denied;——

Mr. Schilback: Exception.

Justice Perlman: —Justice Perlman dissents. The defendant is found guilty; Justice Perlman dissents and votes to acquit. I should like to state the reason for my dissent at this time.

(Justice Perlman's dissenting opinion which was delivered at this point in the proceedings is printed herein at page 76.)

Now, Mr. Schilback, we could adjourn this for Sentence, or if you wish we can proceed to Sentence this morning. This is a corporation. We have all the facts. You, during the course of the trial, offered for proof of the character of [fol. 60] this defendant corporation the type of services rendered, the work done.

Mr. Schilback: Yes, your Honor.

Justice Perlman: If you wish it we will proceed to Sentence this morning.

Mr. Schilback: The defendant is prepared to proceed to Sentence. May I first, your Honor, move to set aside the verdict as contrary to the law, contrary to the evidence, contrary to the weight of the evidence, and on all the other grounds set forth in the Code of Criminal Procedure, and, in addition, on the grounds set forth in my motions to dismiss at the end of the People's case and again at the end of the entire case.

Justice Perlman: By a majority of the Court your motion is denied; I dissent and vote to grant the motion—all motions.

Mr. Schilback: Exception.

Justice Perlman: Now, Mr. Rogers, would you like to be heard first, or, Mr. Schilback, would you like to be heard first on Sentence.

Mr. Rogers: I just have one word to say, your Honor, and that is in view of the Court's decision that this book is obscene, I want to quote just some parts of a letter from Mr. Schilback to the Court, and I don't do it to embarrass Mr. Schilback, I am sure he will understand, but during the time that this decision was pending, before your Honors

POOR COPY

BLEED THROUGH

decided, Mr. Schilback wrote a letter in behalf of the defendant in which he said: "It has probably come to your attention"—meaning the Court—"of a columnist's report that my client, Doubleday and Company, has melted down the plates of 'Memoirs of Hecate County.' The plates of 'Hecate County' have not been melted down, they are still intact in the printing plant of Doubleday & Company, In- [fol. 61] corporated, at Garden City, New York. Unless your Honors decree otherwise, these same plates will be used for future printings of the book." I don't want to read the rest of the letter because I don't think it is important.

I wanted to say in view of the fact that this Court has said that this book was obscene, I assume that the defendant understands that any future publication or printing or selling of this book is a violation of law, established law now of New York City, and will not be tolerated. In that connection I would just like to mention that under the law now anyone who sells it or distributes the book, even by way of a lending library, under the law is guilty of a crime and can be sentenced to one year in jail. And now that the case has been decided and your Honors have found that this book is obscene, the District Attorney's Office will proceed against any individuals who violate the law.

Justice Perlman: Mr. Schilback, I gather you understand that to be the law.

Mr. Schilback: Well, may I first say that the letter from which Mr. Rogers quoted has in it that the plates are intact, and then a sentence which is, "Unless your Honors decree otherwise the same plates will be used for future printings for the book." I can assure the Court that my client and I now fully realize that your Honors have decreed otherwise, and are completely consonant with what that letter says, and as we understand the law to be there will be no printing of this book, no sale of this book, until a determination of an appeal in this case, and if the majority of this Court is reversed, as I am confident will be done, we then feel that there may be future printings and sales of the book. [fol. 62] For the purpose of Sentence I will not repeat what appeared in the course of the trial and came to your Honor's attention. I will say that even with the opinion of the majority in this case, this book was published sincerely by Doubleday & Company, Incorporated, in the real

belief that it was a sincere, definite contribution to American literature. In view of your Honor's decision we are now in a position where we did make a mistake of judgment. However, it was not malicious, but it was a sincere, honest attempt to contribute to current American literature, and I submit that to the Court prior to the imposition of sentence.

Justice Perlman: Mr. Rogers, there are two cases here, you tried them together.

Mr. Rogers: Yes, your Honor, we tried them——

Justice Perlman: There was a stipulation.

Mr. Schilback: That's right, your Honor, except one count of the first indictment was withdrawn. In other words, we tried two counts.

Mr. Rogers: That's right, and at this time I will move to dismiss the count we did not try, because I thought it was superfluous for the purposes of the trial, that is the count giving information where the book may be purchased.

Justice Perlman: As I gather here, then, Information No. 2 on our Calendar today was not tried——

Mr. Schilback: That was tried, your Honor.

Justice Perlman: —Just a minute . . .

Mr. Rogers: In other words, there were two charges, one for selling the book, and one for publishing the book, and those were joined and tried together.

[fol. 63] Justice Perlman: I am just trying to get this clear. There are two counts in one Information——

Mr. Rogers: That is correct, your Honor.

Justice Perlman: And I think those two counts include the count in the Second Information, or did you not try one of the counts in one of the Informations?

Mr. Schilback: One of the counts in that Information was not tried, your Honor.

Mr. Rogers: That's right, we tried the Second Count; we tried the Second Count in Case No. 1 on the Calendar today, which charges the defendant with publishing the book, and we tried the count in Case No. 2 on today's Calendar which charges the defendant with selling the book.

Justice Perlman: Therefore, our verdict——

Mr. Rogers: There were two separate Informations on one trial.

Justice Perlman: Now to be certain that we understand the verdict of the Court, by a majority of the Court all

POOR COPY

BLEED THROUGH

motions are denied, and I dissent in each of these two cases on the Calendar, 1 and 2. By a majority of the Court the defendant is convicted in each of the two cases; I dissent and vote not guilty in each case. By a majority of the Court with my dissent your motions in each of these cases to set aside the verdict is denied.

Mr. Schilback: And I have an exception to each and every one of those rulings.

Justice Perlman: That's right.

Justice Oliver: In view of the fact that this misunderstanding has occurred you must again make your motions for arrest of judgment to dismiss upon each.

[fol. 64] Mr. Schilback: All right. On each count I move to set aside the verdict——

Justice Oliver: Not on each count, on each Information.

Mr. Schilback: On each Information I move to set aside the verdict of this Court as contrary to law, contrary to the evidence, contrary to the weight of the evidence, on all the other grounds set forth in the Code of Criminal Procedure, and on the grounds set forth on my motions to dimiss at the end of the People's case and at the end of the entire case.

Justice Perlman: All right. All those motions are denied; I dissent.

Mr. Schilback: Exception in each case.

Justice Perlman: The sentence of the Court in Case Number 1 on the Calendar, Giving Information—the first case on our Calendar is the Publishing—five hundred dollars; and Case No. 2, Giving Information, five hundred dollars——

Mr. Rogers: No, Selling, your Honor——

Justice Perlman: Selling an Obscene Book, five hundred dollars. That is the sentence of the Court, a total of one thousand dollars.

Mr. Rogers: Just to clear the record as to the other count —has the Court finished the sentence?

Justice Perlman: Yes.

Mr. Rogers: As to the other count, Giving Information, I move to dismiss that count in view of the decision of the Court in the other two cases.

Justice Perlman: That is, Count Number One in Case Number One.

Mr. Rogers: Correct.

Justice Perlman: The conviction is Count Two of the Information.

Mr. Rogers: Yes, your Honor.

[fol. 65] Justice Perlman: Count One is dismissed. Fine is one thousand dollars. Court will recess.

(This is to certify that the foregoing is a true and correct transcript of the within proceedings as reported by me.)

David D. Geddes, C. S. R., Official Stenographer.

In Supreme Court of New York, Appellate Division, First Department

People of the State of New York, Respondent,

against

Doubleday & Company, Inc., Defendant-Appellant

Stipulation as to Exhibits Not Printed

Subject to the approval of the Court it is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the following numbered and described exhibits need not be printed, photographed or photostated in the printed record on appeal, but five copies of each exhibit shall be handed up by the defendant-appellant upon the argument or submission of any appeal herein [fol. 66] with the same force and effect as if incorporated on the printed record on appeal.

People's Exhibit

1. Unmarked copy of "Memoirs of Hecate County."

Defendant's Exhibits

A. Translation of page 300 of People's Exhibit 1.

A-1. Translation of page 307 of People's Exhibit 1.

A-2. Translation of page 317 of People's Exhibit 1.

Dated: New York, December 11, 1946.

Frank S. Hogan, District Attorney of the County of New York. Satterlee, Warfield & Stephens, Attorneys for Defendant-Appellant.

So Ordered. F. M.

(Here follows 5 photos, side folios, 67-68, 69-70, 71-72, 73-74, 75)

POOR COPY

BLEED THROUGH

From the NEW YORK TIMES BOOK REVIEW:

"Memoirs OF HECATE COUNTY

is good in the way the Goncourts or Maupassant are good, and, having recently re-read 'Renée Mauperin', I should say the longest of the six stories, *The Princess with the Golden Hair*, is not only more enjoyable than the French novel but is much more true in its psychological observation and it contains a riper and more human wisdom . . . It is a love story, sophisticated, even cruel, unafraid, yet moving and illuminated with a rare beauty . . . I am convinced every word of it is true.

". . . In reading MEMOIRS OF HECATE COUNTY one is compelled to use, as best one can, the author's own standards. By these, this is a good, a distinguished book." —RALPH BATES.

by Edmund Wilson

At your bookseller's, $3.50 **DOUBLEDAY**

POOR COPY

DEFENDANT'S EXHIBIT "B-1" 468

"The first event of the year which can be described as literary." —*TIME Magazine*

"MEMOIRS OF HECATE COUNTY is pretty certainly the best contemporary chronicle, so far, of its place and period."—*Time Magazine.*

"His writing is almost puritanically plain, yet it is devastatingly effective."—WILLIAM McFEE, *N. Y. Sun.*

"Written with genuine style."
—RICHARD MATCH, *N. Y. Herald Tribune.*

"He is always clear and direct and absorbing."
—*Saturday Review of Literature.*

EDMUND WILSON'S

Memoirs OF HECATE COUNTY

At your bookseller's, $2.50 • DOUBLEDAY

BLEED THROUGH

POOR COPY

N.Y. Times 3/7/46

Edmund Wilson

The New Yorker's famed book critic, takes his readers on a conducted tour through the waxworks of America—Suburbia. Here is America's well-heeled middle class between wars—The Lost Generation—America's most confused people, drawn by a skilled writing craftsman in one of his brilliant works of fiction.

MEMOIRS OF HECATE COUNTY

by

Edmund Wilson

Just published $2.50

DOUBLEDAY

71-72

BLEED THROUGH

POOR COPY

DEFENDANT'S EXHIBIT "B-3" 460

MAY 5, 1946

"The first event of the year which can be described as 'literary'..."
—TIME

Edmund Wilson's
new book

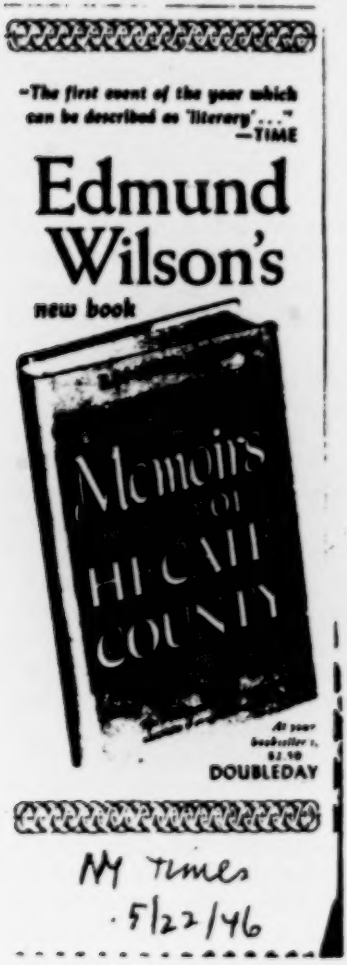
At your bookseller's
$2.50
DOUBLEDAY

73-74

BLEED THROUGH

POOR COPY

DEFENDANT'S EXHIBIT "B-4"



BLEED THROUGH

POOR COPY

[fol. 76] In Court of Special Sessions of the City of New York, New York County

People of the State of New York

against

Doubleday & Company, Inc.

Dissenting Opinion

Opinion of Justice Nathan D. Perlman:

I am inclined to accept the position taken by the prosecution that the story "The Princess with The Golden Hair" may be considered separately and apart from the rest of the book "Memoirs of Hecate County".

The crucial consideration is the standard to be applied by the court, the concept of obscenity against which the story in question must be tested.

The prosecution would have obscenity defined as that which tends to deprave and corrupt the young and immature, those whose minds are open to such immoral influences and into whose hands the book may fall. I find that concept grossly inadequate and, in fact, detrimental to the best interests of the general public.

Such a standard would exclude from consideration the effect of a story or book on the minds of the mature, those who are not open to such immoral influences. These latter, [fol. 77] the bulk of the reading public, must in their daily lives, face, understand and resolve the complex problems of modern life and society. In this connection they have traditionally relied on those artists and writers who possess an acute and sensitive insight into those problems and an ability to convey that insight through the written word.

To adopt a standard of obscenity which would disregard the interests of the mature and ignore the positive and vital contribution which books can make in their lives, is to needlessly sacrifice the welfare of a vast portion of our community. I am confident that such was not the intention of the legislature. Section 1141 of the Penal Law, as every other statute, is fundamentally intended to benefit and protect society as a whole. Consequently it is reasonable to take into account in each case the varied effects of the book or story in question. Any rational evaluation of a book

from the point of view of obscenity must give consideration not only to its detrimental tendency to deprave the minds of the young and immature but also to its beneficial tendency to enlighten the mature.

It was this latter aspect which led United States Circuit Judges Augustus N. Hand and Learned Hand and United States District Judge John M. Woolsey in the Ulysses case to place so much stress on the truth, sincerity and art qualities of the book there under consideration. These Judges weighed carefully the standard now urged by the prosecution in the instant case and rejected it (United States *v.* One Book Called "Ulysses" 72 Fed. 2nd 705; 5 Fed. Supp. 182.)

Giving due weight and consideration to the artistic impact of "The Princess with The Golden Hair" and judg-
[fol. 78] ing that story as a whole, irrespective of certain passages which by themselves might have a tendency to deprave the young and immature, I find that the story is not obscene within the meaning of Section 1141 of the Penal Law.

The writer of the story is evidently and honestly concerned with the complex influences of sex and of class consciousness on man's relentless search for happiness. That is a problem which is also of deep concern to the matured reading public. That public is entitled to the benefit of the writer's insight and that right may not be lightly disregarded by excluding from consideration all interests but those of the young and immature.

To suppress what may appear bad in a book is also to suppress what is good therein. The Court's primary duty is to interpret all laws in the terms of the general welfare.

I vote to acquit the defendant.

(Sgd.) Nathan D. Perlman, Justice of the Court of Special Sessions of the City of New York.

[fol. 79] AFFIDAVIT OF NO OPINION

CITY, COUNTY AND STATE OF NEW YORK, ss:

James F. Dwyer, Esq., being duly sworn, deposes and says, that he is one of the attorneys for the Defendant-Appellant herein, and is familiar with the facts and proceedings herein; that no opinion was delivered or written

POOR COPY

BLEED THROUGH

by the Trial Court in the rendering of the judgments of conviction, but the minority (Perlman, J.), filed a dissenting opinion which is printed herein at page 76.

James F. Dwyer.

Sworn to before me this 3rd day of January, 1947. Robert V. Damiano, Notary Public in the State of New York, Residing in New York County. N. Y. Co. Clk's No. 31, Reg. No. 255D7. Commission Expires March 30, 1947. (Seal.)

[fol. 80] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 81] In Court of Appeals of New York

People of the State of New York, Respondent,

against

Doubleday & Company, Inc., Defendant-Appellant

Notice of Appeal to Court of Appeals

Sirs:

Please Take Notice that the defendant hereby appeals to the Court of Appeals from the judgments of the Appellate Division of the Supreme Court for the First Judicial Department dated May 16, 1947 affirming the judgments of conviction rendered against said defendant in the Court of Special Sessions of the City of New York, County of New York, on the 27th day of November, 1946, and from each and every part of said judgments and all other and intermediate orders herein made.

Please take further notice that this appeal is taken pursuant to leave granted on June 13, 1947 by Hon. Stanley H. Fuld, a Judge of the Court of Appeals, who certified that [fol. 82] there are questions of law involved which ought to be reviewed by the Court of Appeals.

Dated, New York, N. Y., June 16, 1947.

Yours, etc., Satterlee, Warfield & Stephens, Attorneys for Defendant-Appellant, Office and Post Office Address, 49 Wall Street, Borough of Manhattan, New York 5, New York.

To: Hon. Frank S. Hogan, District Attorney of New York County. Hon. Antonio Calitri, Clerk, Court of Special Sessions of the County of New York.

[fol. 83] At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 16th day of May, 1947.

Present: Hon. Francis Martin, Presiding Justice; Hon. Albert Cohn, Hon. Joseph M. Callahan, Hon. David W. Peck, Hon. John Van Voorhis, Justices.

17625-17626

Order of Affirmance on Appeal from Judgment

People of the State of New York, Respondent,

vs.

Doubleday & Company, Inc., Appellant

Order of Affirmance

Appeals having been taken to this Court by the defendant from judgments of the Court of Special Sessions of the City of New York, New York County, rendered on the 27th day of November, 1946, convicting defendant, upon two informations consolidated for trial, of selling and publishing an obscene book and said appeal having been argued by Mr. Whitney North Seymour of counsel for the appellant, and [fol. 84] by Mr. Whitman Knapp of counsel for the respondent, and a brief having been filed by Womrath Bookshops & Libraries, Inc., as *amicus curiae*; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgments so appealed from be and the same are hereby, in all things, affirmed.

Enter

F. M.

BLEED THROUGH

POOR COPY

[fol. 85] IN COURT OF APPEALS OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK, Respondents,

against

DOUBLEDAY & COMPANY, INC., Defendant-Appellant

CERTIFICATE OF LEAVE TO APPEAL TO COURT OF APPEALS

I, Stanley H. Fuld, a Judge of the Court of Appeals, do hereby certify that in the record and proceedings in the Appellate Division of the Supreme Court, First Judicial Department, in the cause of People of the State of New York *v.* Doubleday & Company, Inc., questions of law are involved which ought to be reviewed by the Court of Appeals.

Dated, New York, N. Y. June 13, 1947.

(Signed) Stanley H. Fuld, Associate Judge of the Court of Appeals.

[fol. 86] DEFENDANT'S EXHIBIT "A"

Translation of pages 300, 307-317 in "Memoirs of Hecate County," by Edmund Wilson.

(Introduced in evidence as Exhibit A, see fol. 197.)

Mr. and Mrs. Blackburn at home.

(page 300) "Ah, you know, it's tremendous. It's the real American art which the Americans don't know."

(page 307) It's not the Parthenon, but it belongs to the beautiful.

(page 308) (If we're in for some catastrophic happenings, it will hardly turn out to the advantage of Hell). The Devil will not find what he expected there. The European world, allow me to express myself in French, is starting to inure itself to all moral considerations to a point where one is as satisfied with him as with him who is supposed to be against one. It doesn't make any difference to you that we speak French. I know that you know it well. You were raised in France, right? So you have a very good ear. It's happened in the last years that I resort more and more to this language so finished and so clear. It's the only way, I find, to give a semblance of logic to the happenings which

are becoming every moment more and more insane. (What he said about my French was not true, but it pleased me to hear him say it. His own French I had always thought that of a Belgian businessman or of an American lawyer who has practiced in Paris; but, as I listened to him talking tonight, I seemed to note in it a certain flavor, a turn of phrase, of the eighteenth century. Returning to the earlier topic, I asked him whether the Nazis in Germany were doing nothing to gratify the Devil).

[fol. 87] (page 309) "As for Hitler himself," (he replied), he's hardly interesting for the Devil. Why, he's a saint, a patriot, a type along the line of Joan of Arc. That idiot doesn't even want to do harm. He goes to no end of trouble, in the light of moral principle, to have massacred a Jew or a Pole, because he doesn't know it's only a man—being himself hardly a man. He's a madman, a paranoiac, like most of the saints, after all. He thinks quite simply that he's persecuted, that in him his country is persecuted and that it's very necessary to defend himself. As for the other Nazis, except Goebbels, who is a rather fine example of the abortive and embittered man of letters, they are only third or fourth rate scoundrels or simply Schaffkopfe Germans, who from the moment they could no longer take seriously the Sovereign Judge nor his Adversary, made their stronghold a beautiful discovery: the knowledge that they had found perfectly a state where they could do everything they wanted on the land without running the risk either of being overwhelmed on the spot by one or of being abused by the agents of the other. I don't want, however, to give the impression of not attaching importance to this certainty of contemporary man that he is free to destroy or construct, to do what seems to him good for himself and for those who submit to him, without regard for the good and bad institutions within superhuman powers. It's even, this revolution on a moral plan, the main issue of our time —an event alongside which the regroupings about which one hears so much are either presented only as very superficial charges, the replacement of one band of insects by another, a political hocus-pocus which remains without any significance because the social classes which substitute one for the other feel, both of them, exactly the same desires [fol. 88] and propose identical ends—or else they owe their sole interest, these regroupings, to which they've set to brawling by the impulse of this central motor.

POOR COPY

BLEED THROUGH

One sees clearly that it's almost the same thing in Russia. Stalin does what he wants with the Russians because, as a Marxist, he didn't shrink from the liquidation of religion and found himself immediately, with primitive joy—and a little

(page 310) astonishment, I think—supreme and unchangeable master of 170 million human beings whom he knows how to guide exactly like a great agricultural tractor on one of his collective farms. One can organize them, you know on any sort of scale to accomplish any sort of work. One can even make them swallow the idiotic likes of the Pravda—and one can make them ascribe to any sort of idea. First, you talk to them about the Five Year Plan and you impress them into factory service and public works—a kind of business the Russians hardly like, afterwards you'll make them fight the Germans at a price of 25 million men, after which Comrade Stalin himself will have opened the door to the Nazis and, so to speak, will have invited them expressly to overrun homeland Russia—because this very shallow man admires Hitler and is even awestricken before him. He will want to be a good ally even on the eve of the day when this madman will show him with a stroke of bombs and machine guns that, to admire a great moral power, it isn't necessary to give it your confidence, especially when you yourself make the pretense of playing an amoral role. I'm speaking of things which haven't happened yet but will surely occur."

. (Little enthusiasm though I felt for Stalin, I could not believe in these fantastic prophesies, which seemed to me [fol. 89] prompted by some spirit of perversity at the same time philistine and cynical; and I reminded him that it had been, after all, the idealists Lenin and Trotsky who had first mobilized and unified the Russians, and that the Soviet Union had been dedicated to the establishment of a socialist society. I spoke of the morality of Marxism and of the creative aims of the Marxists.) I don't have a doubt, he replied, that Lenin and Trotsky, like Marx—had indeed their own morality, but this rather exalted morality interests only moderately him whom you know as the devil. Without doubt there are striking scraps of old Protestant theology in this system which is so vaunted as being free from all religiousness, but it is undoubtedly the last ray of a light which is going out; and it appears to me only too evident that this Marxist system itself is always deteriorating

and that the time is not very far off when Stalin will smite it with a taboo and will not scruple to exterminate those who profess it. Meanwhile, I concede you that the

(page 311) grandiose projects which they strive to realize in the Soviet Union could very well be directed towards an end which you characterize as the good, that they could even merge them, even though it appears to me that the chances are at least equal that they will merge in what you call the bad. In one case or the other, the important thing for the person of whom we speak is that the Russians as well as the Germans operate only for uniquely practical motives and that they do not hamper the ancient prestige of these powers of heaven and hell to which their forefathers have paid so much homage. You think strongly that the Fiend is far from staying much longer in this atheist country where they no longer value his work and where he no longer feels at home. He's a character, a kind of character, as Saint-[fol. 90] Simon said of Voltaire—with the important difference that the future was with Voltaire—(he gave a rueful and ironic smile) he's a character of the old European world who has adapted himself as best he can to capitalistic society but who no longer speaks the same language as these scoundrels from the Kremlin and the Wilhelmstrasse —these *khamy* as they were formerly called in Russia.

You undoubtedly remember the soviet agent, the professional informer, whom you met here. He's a very clever man, very crafty—a native of Bessarabia and marvelous at all languages. He had even—a thing which one sees rather seldom among Soviet diplomats—learned to acquire in the course of his travels a certain knowledge of the world. Formerly I would very willingly have recruited him, but today I don't want any part of him, I no longer have anything to offer him. I assure you this man makes me afraid. It's he who tried to tempt me. When he wrote me begging me to receive him, I would like to have been able to delude myself with the hope that he had some need of me, although the rather peremptory tone with which he sent word didn't leave me without anxiety. I knew well that they placed him at the embassy to spy on the unhappy ambassador, and to make sure he didn't interest himself too much in the countries near the one from which he was accredited—and I couldn't stop myself from asking whether he was instructed to come and rummage through my affairs. Well, he had the cheek to propose that I devote part of my time—(a part

POOR COPY

BLEED THROUGH

time job, as we say)—to his beautiful organization. He expounded to me with a frankness which sought by no means to spare my sensitiveness

(page 312) as dean of Evil—since I know well there is neither the means nor necessity to hide from you my identity—you're very intelligent and I dare to hope that [fol. 91] it doesn't embarrass you if I speak with entire frankness—this dope then pointed out with steely logic that the Good D—(that my Opposite Number)—It's I this time who almost fails to show respect—there's the vice of the century, as I was saying just now: the contempt for sacred things!—(that my Opposite Number had been liquidated and that my own occupation was gone.) Well, I couldn't do better than to engage myself to the service of the U.S.S.R. I struggled to make him admit that there still remained in Russia real and living traces of conscious human maliciousness. I raised several public lies on the part of the government which seemed to me as gratuitous as the very passionate inventions of the incomparable Russian novel, and I recalled to him the traits of cruelty which seemed to me absolutely worthy of the beautiful days of Ivan the Terrible. I cited for him the Russian word *chistka*—a delicious euphemism which means, in a literal sense, quite simply a light purge but which is used also to denote the condemnation to death or to forced labor of a million men and women who have done nothing more guilty than to consecrate their entire lives to applying the principles of Lenin and to striving to consummate his work. 'Always these diminutives, I said to him, it's this childlike way of speaking that gives so much charm to the adorable Russian language, don't you think?' 'Without speaking of Ivan IV,' he replied, talking like a lawyer, haughty and harsh like a judge, 'whom we have come to recognize as the great stabilizer of primitive and divided Russia as well as the founder of strong and manageable Russia—I can tell you that under the Soviet Regime all these diminutives of the old Russian [fol. 92] language—which are only humiliating remembrances of the fawning and servile manners of feudal slavery—I can tell you that these cute childishnesses are in the process of disappearing. We tolerate them, we men of culture, in pursuance of a necessity which makes us sometimes tolerate the ridiculous inclinations of a rather backward people, until they have been taught a more modern language, entirely technical and clear-cut which will not

leave any place for all these insipid gentilities which are debasing.

(page 313) He assured me, for the remainder, with much insistence, that there was no conscious cruelty in the purges which were administered in Russia, and I was obliged, my faith, to believe him. Stalin, himself naturally—as well as some others of his officials—are not the same brand as Hitler and the vulgar German tyrants: they are either primitive men to whom vengeance brings a keen satisfaction or timid and ambitious beings who like to crush—while relishing a bitter pleasure—the more courageous and unselfish souls. But, in general, it is only too true that in Stalinist Russia they are succeeding in conditioning the young people to apply these murderous methods with an almost automatic cold bloodedness. They shoot the condemned men in the back, as you know, while bringing him before the tribunal; blood flows in two little canals built into the side of the road, and they wash it away with great jets of water that leave hardly a trace. The bodies don't stay there very long—they remove them, bury them, and think no more about it. In the case where the wife must also disappear, they aren't bothered about the children, who, without understanding anything about it, find themselves orphans all of a sudden, [fol. 93] and become objects of scorn for their school companions and even for their teachers—nobody dares to come to their aid. But, what's stupefying to me, they won't even experience any pleasure in thinking about their misfortunes. They simply let them fall like scraps which aren't the right size on the convoys of the Taylorized factories, where as every other people except the Soviet Russians take care to gather them up and to find some use for them, although one is far from forgetting of course, that the human resources of Russia are as unlimited as her grains and minerals. As for Hitler Germany—you can believe me on my word, though I doubt that you will stop there—this will be enlarged on again. They will apply themselves very systematically to asphyxiating and burning people wholesale in a type of homicidal factory built especially for that—they will reduce them to ashes with astonishing speed and they will distribute them in large sacks in the agricultural districts to be used as fertilizer for the fields. They will mobilize for this, first, the pathological criminals who will be freed from the chain-gangs on the conditions that they lend themselves to crimes even more than the ones for which

POOR COPY

BLEED THROUGH

they were imprisoned. But they are there only as a (page 314) temporary expedient, employed only until the day when they will have taught the young people that everything that isn't German isn't human, so well that they will find themselves in the position of performing similar duties without flinching but without enjoying the least pleasure. All of which, naturally, hardly makes me rejoice.

Ah, how I will regret the good taste of the French on the day when France will find herself, as she is going to be, torn up by the brutes of Boche. French cruelty, you [fol. 94] know, is a little a national specialty like cooking and the criticism of literature. What a marvel, The Garden of Torments, it's the beautiful title of a book by Mirabeau—from the French novel of Laclos up to Proust. Louis de Sade, what a tremendous genius. I was musing about it just now when I thought about the unspeakable vileness of these types of Soviet Russia, you'll pardon me if I always return to it, who don't scruple to denounce their mothers and fathers, their brothers and sisters, their lovers, their mistresses, and their best friends. Undoubtedly you know the Marquis de Sade was, under the Terror, a judge of the revolutionary tribunal. It happened by chance one day just his mother-in-law and father-in-law had to appear before him. Now the parents of his wife, especially his mother-in-law, had persecuted him without respite and without pity at the time of his marriage, had it stopped three times, and even wanted to have him imprisoned for life. Well, this splendid man, who was in a position to ruin them, saved them from the guillotine. 'I have had my revenge,' he said. He knew well that there was no better way of exasperating his mother-in-law who had made implacable efforts for thirty years to vilify him as an inhuman monster. It's a very French quality of mind, very delicate, very prudent, very chaste. The misfortune for the marquis," (he added: with a sharp pleased and jeering laugh,) was that this gesture got him accused of a suspect moderation. He was forthwith condemned to death—he who cheered up the old woman so well.

"Ah, the splendid eighteenth century!—it was still believing, even while parading liberal thought and scorn for morality. The blasphemies and ironies only proved that religion had not yet lost its empire. Me, I no longer have anything to do in a world where there isn't any and I can't live [fol. 95] in it any longer. That's why I do everything I

can to bring back religion in Europe. That surprises you? (It had surprised me for a moment, though I

(page 315) remembered that he had entertained Jacques Maritain, Aldous Huxley, and Monsignor Darcy.) I noticed very late that I had been guilty of a great error which was almost fatal to me. I woke up one fine morning with the slightly consoling consciousness that the catholic church of the Middle Ages had followed the road of the political good friend, as well for me as for her, when she had all the heretics burned. She knew well that, from the moment when one placed seriously in doubt a single one of her articles of faith, from the moment when one took it into his hand to reflect on these things by himself, it would all be up with religion. There would be nothing more than a complete fall. Formerly I didn't see this clearly, but to me this is more evident than the present hour. All these very intelligent rebels, on whom I sometimes dared to count to help me in my own affairs—as sympathetic as they appear to you—the church knows what she is doing when she suppresses them with a pitiless severity. From the moment when Luther escaped from the fold, the death-bell of the church tolled—this introduced not only the dismemberment of the catholic church but also the progressive weakening of the conception of a church—and I fear this continues up to the point where there will be no more cult, then no more true religion because one must know to accept as religious the rationalist and purely ethical sects like positivism in France and Unitarianism in your country. I can tell you, (he added, dropping his indignant tone with the lightness of good taste,) that my own little personal cult hardly exists any longer. There are only the frivolous students or the ridicu-
[fol. 96] lous pederasts who want to give me the honor of several rites fallen into decadence.

As I was saying to you, I didn't at first perceive where the success of these fine preachers led. I gave them lively encouragement in their blowing of hardier words. Moralists always offered me very rich opportunities. The great distinguish themselves by an educated mind and a firm and well disciplined character, who fall sometimes, in their thirst for power, with an admirable facility, into pride and fanaticism. Consciousness of virtue, you know, sometimes produces a kind of drunkenness upon which one comes by persuading himself, very willingly, that all the beings who differ from one haven't the right to persist in their errors; and when one

POOR COPY

BLEED THROUGH

permits himself to become fierce in wanting to make people virtuous, one ends by doing my work—like your neighbor M. Stryker.

(Page 316) (he added with a humorous smile), a true chip, embittered and tenacious of the old Protestant block. Then I started by delighting in this new kind of moralist, who otherwise as interesting as the spoilt prince of the church, showed himself with such a fresh and lively force and who gives us an unheard of ascendancy over the more unruly souls of their times—the Calvinists of the best sort were worthy of Torquemada, and the flowering of this protestant movement from the vulgar cannibalism of Robespierre charmed me to such a point that I did not at first realize that the worshipers of the supreme being no longer paid any attention to me. Then I couldn't get over my surprise and chagrin that I found myself in the presence of Marx, who—I concede it willingly—(he gave me a sly look) could pride himself on some beautiful, bigoted, and destroy-[fol. 97] ing strokes but who brought to men as religion only his dialectical materialism. You think wisely that I didn't find much amusement in eternally playing the role of Thesis in this entirely abstract theology which imposed on me the absurd obligation of being eaten, so to speak, periodically the forever virtuous 'antithesis'—an operation which compelled me, forcibly, to renounce all individuality. I tried to lend myself to it, and I didn't succeed: here I was suddenly embroiled, entangled, engulfed in boring and interminable discussions which recalled Christian casuistry but which possessed neither the flexibility nor the grace. The worst is that these protagonists of Marxist morality didn't even take it seriously: they like and seek only power, an entirely secular power, which, although it dreams of a richer life for future humanity or complete subjugation, didn't leave me any more reason for existence.

In sum total, I emigrated to your country, where the tendencies are not yet developed to this fatal end. You have done such beautiful things in the business of strong morality, don't you know? The Mathers and Jonathan Edwards—about whom it seems to me you heard people speak with so much insight last summer—they were real titans. And to think that Aaron Burr was the grandson of Edwards. In my opinion, it's the most remarkable intellectual family in the United States. I don't know of a stronger quality of mind than this, although I believe this was said

a little after eighteen hundred. He visited me a great deal, Burr, when he lived in Europe. He became, in his last years, a veritable European.

[fol. 98] IN COURT OF APPEALS OF NEW YORK

STATE OF NEW YORK, ss:

Pleas in the Court of Appeals held at Court of Appeals Hall, in the City of Albany, on the 13th day of November in the year of our Lord one thousand nine hundred and forty-seven, before the Judges of said Court.

Witness, The Hon. John T. Loughran, Chief Judge, Presiding; John Ludden, Clerk.

THE PEOPLE &c., Respondent,

ag'st

DOUBLEDAY & COMPANY, INC., Appellant

REMITTITUR—November 14, 1947

Be It Remembered, That on the sixth day of August in the year of our Lord one thousand nine hundred and forty-seven, Doubleday & Company, Inc., the appellant in this cause, came here unto the Court of Appeals, by Satterlee, Warfield & Stephens, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department.

And The People &c., the respondent in said cause, afterwards appeared in said Court of Appeals by Frank S. Hogan, District Attorney.

Which said Notice of Appeal and the return thereto, filed [fol. 99] as aforesaid, are hereto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Whitney North Seymour, of counsel for the appellant, and by Mr. Whitman Knapp, of counsel for the respondent, and after due deliveration had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed.

Upon this appeal there was presented and necessarily passed upon a question under the Constitution of the

POOR COPY

BLEED THROUGH

United States, viz: The defendant argued that its conviction violated the right of freedom of speech guaranteed by the Fourteenth Amendment of the Constitution of the United States. This Court held that the conviction aforesaid did not violate the right of freedom of speech guaranteed by the Fourteenth Amendment of the Constitution of the United States.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Court of Special Sessions of the City of New York there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be affirmed &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Court of Special Sessions of the City of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which rec-
[fols. 100-118] ord now remains in the said Court of Special Sessions before the Justices thereof, &c.

John Ludden, Chief of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office, Albany, November 13, 1947.

I hereby certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal.)

[fol. 119] SUPREME COURT OF THE UNITED STATES

DOUBLEDAY & COMPANY, INC., Appellant,

vs.

PEOPLE OF THE STATE OF NEW YORK

ORDER ALLOWING APPEAL

The appellant in the above-entitled cause, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from a judgment made and ren-

dered in the above-entitled cause by the Court of Appeals of the State of New York on November 13, 1947, affirming the judgments of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, rendered May 16, 1947 and of the Court of Special Sessions of the City of New York rendered November 27, 1946, and from each and every part of said judgment of the Court of Appeals of the State of New York, and having presented and filed its petition for appeal, assignment of errors, prayer for reversal, and statement as to jurisdiction, pursuant to the statutes and rules of the Supreme Court of the United States in such case made and provided;

[fol. 120] It Is Now Hereby Ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the Court of Appeals of the State of New York in the above-entitled cause as provided by law, and it is further ordered that the Clerk of the Court of Special Sessions of the City of New York shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within forty days from this date.

And It Is Further Ordered that security for costs on appeal be fixed in the sum of $1,000.00.

Dated: January 9th, 1948.

John T. Loughran, Chief Judge of the Court of Appeals of the State of New York.

[fol. 121] Supreme Court of the United States

[Title omitted]

Petition for Appeal

To the Honorable the Supreme Court of the United States:

Considering itself aggrieved by the final decision of the Court of Appeals of the State of New York in the above entitled cause, the appellant herein, Doubleday & Company, Inc., hereby prays that an appeal be allowed to the Supreme

POOR COPY

BLEED THROUGH

Court of the United States herein, and for an order fixing the amount of the bond as security for costs thereon.

Assignment of Errors

And the said Doubleday & Company, Inc. assigns the following errors in the record and proceedings in the said case:

1. The Court of Appeals of the State of New York erred in holding that subdivision 1 of section 1141 of the Penal Law of the State of New York, as construed and applied to appellant, is not void as violative of appellant's rights under the due process clause of the Fourteenth Amendment because it abridges appellant's right to freedoms of speech and of the press.

[fol. 122] 2. The Court of Appeals of the State of New York erred in holding that subdivision 1 of section 1141 of the Penal Law of the State of New York, as construed and applied to appellant, did not deprive appellant of its property without due process of law in violation of the Fourteenth Amendment.

3. The Court of Appeals of the State of New York erred in holding that appellant's conviction and sentence under subdivision 1 of section 1141 of the Penal Law of the State of New York was not unconstitutional, illegal, void and of no effect under the due process clause of the Fourteenth Amendment.

4. The Court of Appeals of the State of New York erred in affirming the judgments of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department and of the Court of Special Sessions of the City of New York.

Prayer for Reversal

For which errors the appellant, Doubleday & Company, Inc., prays that the said judgment of the Court of Appeals of the State of New York, dated November 13, 1947, affirming the judgments of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, and of the Court of Special Sessions of the City of New York, be reversed and a judgment rendered in favor of the

said appellant setting aside its conviction and directing the cancellation and the remission of the fine levied against it, and for costs and for all other proper relief.

Dated: January 5, 1948.

(Signed) Whitney North Seymour, Counsel for Appellant.

[fols. 123-125] Citation in usual form omitted in printing.

[fols. 126-128] Bond on appeal for $1,000.00 approved and filed; omitted in printing.

[fol. 129] Supreme Court of the United States

[Title omitted]

Stipulation as to Record on Appeal

Pursuant to the provisions of Paragraph 2 of Rule 10 of the Rules of the Supreme Court of the United States, It Is Hereby Stipulated And Agreed by and between counsel for the respective parties hereto that the portions of the record to be included in the transcript to be filed in the Supreme Court of the United States, pursuant to an appeal duly allowed in the above entitled cause, shall include the following, to wit:

1. Informations numbered 3176 and 3177 filed in the Court of Special Sessions of the City of New York on July 24, 1946, together with endorsements on said informations.

2. Official transcript of the minutes of the proceedings before the Court of Special Sessions of the City of New York on October 29, 1946.

3. Official transcript of the minutes of the proceedings before the Court of Special Sessions of the City of New York on November 27, 1946.

4. All exhibits received in evidence at the trial.

5. Dissenting opinion of Mr. Justice Perlman.

[fol. 130] 6. Extracts from minutes of the Clerk of the Court of Special Sessions of the City of New York as to Informations Nos. 3176 and 3177.

7. Notices of appeal to the Appellate Division of the Supreme Court of the State of New York, First Judicial

POOR COPY

BLEED THROUGH

Department from the judgments of the Court of Special Sessions of the City of New York.

8. Order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, dated May 16, 1947.

9. Certificate of Hon. Stanley H. Fuld, Associate Judge of the Court of Appeals of the State of New York, dated June 13, 1947.

10. Notice of appeal to the Court of Appeals of the State of New York from the judgment of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department.

11. Remittitur of the Court of Appeals of the State of New York, dated November 13, 1947.

12. Appellant's statement as to jurisdiction.

13. Appellant's petition for appeal, assignment of errors and prayer for reversal.

14. Order allowing appeal.

15. Citation issued upon appeal.

16. Appellant's statement directing attention to the provisions of Paragraph 3 of Rule 12 of the Rules of the Supreme Court of the United States.

17. Proof of service of foregoing papers numbered 12, 13, 14, 15, and 16.

18. Bond for costs.

19. This stipulation.

Said transcript to be prepared by the Clerk of the Court of Special Sessions of the City of New York as required by [fol. 131] law and by the Rules of the Supreme Court of the United States and to be filed in the office of the Supreme Court of the United States at Washington, D. C., on or before the return day of the citation.

Dated, January 12, 1948.

Whitney North Seymour, Counsel for Appellant; Frank S. Hogan, Counsel for Appellee, by Whitman Knapp.

[fols. 132-133] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 134] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF THE RECORD NECESSARY FOR CONSIDERATION THEREOF—Filed January 19, 1948

1. Now comes the appellant in the above entitled cause and, for its statement of points upon which it intends to rely in its appeal to this Court, adopts the points contained in its assignment of errors heretofore filed herein.

2. Appellant designates the entire record filed in this Court as necessary for the consideration of the foregoing points. Pursuant to the attached stipulation, which is hereby expressly made a part hereof and which has been executed by counsel for the respective parties hereto, said appellant designates as parts of the record to be printed, all of said record except People's Exhibit 1, which is a book entitled "Memoirs of Hecate County," by Edmund Wilson.

Dated, January 12, 1948.

Whitney North Seymour, Counsel for Appellant.

[fol. 135] Service of above statement and designation accepted and acknowledged this 12 day of January, 1948.

Frank S. Hogan, District Attorney of the County of New York, State of New York.

[fol. 136] SUPREME COURT OF THE UNITED STATES

STIPULATION

It Is Hereby Stipulated And Agreed by and between counsel for the respective parties hereto, as follows:

1. The Clerk shall print the entire record filed in this Court except People's Exhibit 1, which is a book entitled "Memoirs of Hecate County", by Edmund Wilson.

2. Either of the parties may refer to and quote in its brief or argument any part of said exhibit and may supply printed copies thereof as a supplement to its brief.

Dated, January 12, 1948.

Whitney North Seymour, Counsel for Appellant; Frank S. Hogan, Counsel for Appellee, by Whitman Knapp.

[fol. 136a] [File endorsement omitted.]

POOR COPY

BLEED THROUGH

[fol. 137] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—March 15, 1948

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

[Endorsed on Cover:] File No. 52,769. New York, Court of Appeals. Term No. 539. Doubleday & Company, Inc., Appellant, vs. People of the State of New York. Filed January 19, 1948. Term No. 539 O. T. 1947.

INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Opinion below	1
Jurisdiction	2
Statutory provisions sustaining jurisdiction	2
State statute involved	2
Date of the judgment and date of the application for appeal	3
Nature of the case	3
The Federal question presented is substantial	7
Conclusion	15
Appendix—Dissenting opinion in the Court of Special Sessions of the City of New York	16

Table of Cases Cited

Bridges v. *California*, 314 U. S. 252	7
Cantwell v. *Connecticut*, 310 U. S. 296	7
Chaplinsky v. *New Hampshire*, 315 U. S. 568	13
Craig v. *Harney*, 331 U. S. 367	9
Doubleday & Company, Inc. v. *People of the State of New York*, 272 App. Div. 799	2, 5
Gitlow v. *New York*, 268 U. S. 652	7, 13
Halsey v. *New York Society*, 234 N. Y. 1	12
Herndon v. *Lowry*, 301 U. S. 242	7
Home Ins. Co. v. *Dick*, 281 U. S. 397	7
Lovell v. *Griffin*, 303 U. S. 444	9
Lynch v. *New York*, 293 U. S. 52	6
Parmelee v. *United States*, 113 F. (2d) 729	12
Pennekamp v. *Florida*, 328 U. S. 331	7
People v. *Berg*, 241 App. Div. 543, 269 N. Y. 514	12
People v. *Pesky*, 230 App. Div. 200, 254 N. Y. 373	12
People v. *Winters*, 294 N. Y. 545	12
Regina v. *Hicklin*, 3 Q. B. 360	12
Schenck v. *United States*, 249 U. S. 47	8
Schneider v. *State*, 308 U. S. 147	13

Page

Stewart & Co. v. *Sadrakula*, 309 U. S. 94 7
Thomas v. *Collins*, 323 U. S. 516 9
Thornhill v. *Alabama*, 310 U. S. 88 9
United States v. *Levine*, 83 F. (2d) 156 12
United States v. *One Book Entitled Ulysses*, 72 F. (2d) 705 12
Winters v. *New York*, No. 3, October Term, 1947 .... 6, 12

STATUTES CITED

Constitution of the State of New York, Article VI, Sec. 18; N. Y. City Crim. Cts. Act, Sec. 31 1
Constitution of the United States:
First Amendment 7, 12
Fourteenth Amendment 2, 6, 7
"Free Speech in the United States"—Chafee 13
"Government and Mass Communications"—Chafee, pp. 59-60 13
Judicial Code, Section 237a, 28 U. S. C. A. 344a, as amended by the Act of January 31, 1928, 28 U. S. C. 861a and 861b 2
New York Penal Law, Subdivision 1 of Section 1141 (New York Laws of 1909, Ch. 88, as amd. by Laws of 1941, Ch. 925) 2

POOR COPY
BLEED THROUGH

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 539

DOUBLEDAY & COMPANY, INC.,
Appellant,

vs.

THE PEOPLE OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of this Court, appellant submits herewith its statement showing the basis upon which it is contended that this Court has jurisdiction upon appeal to review the judgment in the above entitled cause.

Opinion Below

This cause was tried before the Court of Special Sessions of the City of New York, a three-judge court which has jurisdiction to try misdemeanors without a jury (N. Y. Constit., Art. VI, § 18; N. Y. City Crim. Cts. Act, § 31). That court convicted by a divided vote. The majority wrote no opinion. The dissenting Justice wrote an opinion which is appended to this statement. Neither the decision of the court nor the dissenting opinion is reported. Defend-

ant appealed to the Appellate Division of the Supreme Court for the First Judicial Department. There the judgment was affirmed without opinion (272 App. Div. 799). An appeal was then taken to the State Court of Appeals which also affirmed without opinion. That decision has not yet been reported.

Jurisdiction

(a)

This Court has jurisdiction under § 237(a) of the Judicial Code; 28 U. S. C. § 344(a), as amended by the Act of January 31, 1928, 28 U. S. C. §§ 861a, 861b.

(b)

The statute of the State, the validity of which as construed and applied was drawn in question below, is subdivision 1 of Section 1141 of the New York Penal Law (New York Laws of 1909, Chap. 88, as amd. by Laws of 1941, Chap. 925), which, so far as here pertinent, reads as follows:

> "A person who sells * * * or has in his possession with intent to sell, lend, distribute or give away, or to show * * * any obscene, lewd, lascivious, filthy, indecent or disgusting book * * * or who * * * prints, utters, publishes, or in any manner manufactures, or prepares any such book * * * is guilty of a misdemeanor * * *."

Aside from the appellant's concessions below that it published and sold the book "Memoirs of Hecate County," by Edmund Wilson, the only evidence offered by the State was the book itself. Although none of the courts below wrote any opinion, the conviction and the affirmances thereof necessarily implied holdings that the statute applied to that book.

The validity, under the Fourteenth Amendment, of the statute as thus construed and applied to appellant's book,

POOR COPY

BLEED THROUGH

was drawn in question in the courts below and the decision was in favor of its validity.

(c)

The judgment of the New York Court of Appeals, which is sought to be reviewed, was dated November 13, 1947. The date upon which the application for appeal is presented is January 6, 1948.

(d)

Nature of the Case

On July 24, 1946, the District Attorney of New York County filed two informations, numbered 3176 and 3177 against the appellant. No. 3176 contained two counts: The first charged the appellant with publishing an advertisement giving information as to how "a certain obscene, lewd, lascivious, filthy, indecent and disgusting book entitled 'Memoirs of Hecate County' can be purchased"; the second count charged appellant with publishing the same book. No. 3177 charged appellant with selling the same book.

Appellant pleaded not guilty to both informations. Both were then consolidated for trial and, on the State's motion, the first count in No. 3176 was dismissed. At the trial, which was held in the Court of Special Sessions of the City of New York on October 29, 1946, the appellant conceded publication and sale of "Memoirs of Hecate County" and, after the book was received in evidence, the State rested. Appellant then moved to dismiss the informations on the ground that the book is not obscene and:

> "On the further ground that, if Section 1141 of the Penal Law includes in its condemnation People's Exhibit 1, the statute is unconstitutional under Section 6 of the New York State Constitution, guaranteeing liberty of press and liberty of speech;

> In addition, if Section 1141 of the Penal Law includes in its condemnation People's Exhibit 1, that the statute is unconstitutional as a violation of the due process clause of the Fourteenth Amendment of the United States Constitution" (R. 21).

Decision was reserved on this motion.

Appellant then adduced the testimony of two witnesses, one to establish the appellant's reputation as a publishing firm; the other to testify to the reputation of Edmund Wilson, the author of the book, and to the book's literary merit.[1] Appellant and the State then rested and, again, appellant moved to dismiss the information on the ground that the book did not fall within the statute and:

> "On the further ground that, if Section 1141 of the Penal Law is interpreted so as to include People's Exhibit 1, 'Memoirs of Hecate County,' it is unconstitutional under both the New York State and the Federal Constitutions; that in those Constitutions, without limiting the motion to particular sections, it is unconsitutional under Section 8 of the New York State Constitution and in violation of the due-process clause of the Fourteenth Amendment to the Federal Constitution; * * *." (R. 55.)

Again decision was reserved.

On November 27, 1946, the court reconvened and, by a majority vote, denied appellant's motions and found appel-

---

[1] Edmund Wilson is a recognized leading American literary critic. He enjoys a reputation "perhaps higher than any other one critic." His earlier works have been acclaimed by the literary world and some are used as textbooks in literature courses given by leading universities (R. 40-41). "Memoirs of Hecate County" has received serious and lengthy literary reviews in many periodicals which customarily deal with literature, including "United States Quarterly Book List" (which is published by the Library of Congress), the New York Times, the New York Herald Tribune, the Saturday Review of Literature, the Knickerbocker Weekly, and many others.

BLEED THROUGH POOR COPY

lant guilty. The dissenting Justice then filed his opinion, copy of which is appended to this statement. Counsel for the State then announced "that any future publication or printing or selling of this book is a violation of law, established law now of New York City, and will not be tolerated. In that connection I would just like to mention that under the law now anyone who sells it or distributes the book • • • is guilty of a crime and can be sentenced to one year in jail." To which the Justice presiding added "I gather you [the appellant] understand that to be the law" (R. 61). Appellant's motion to set aside the verdict "on the grounds set forth on my motions to dismiss at the end of the People's case and at the end of the entire case" was then denied, and an exception taken (R. 64). Appellant was sentenced to pay a total fine of $1,000 and such fine was paid.

There is no assignment of error practice on appeals taken to New York appellate courts. Accordingly, the only methods of preserving a claim of error in such courts are by brief and argument.

On Appeal to the Appellate Division of the State Supreme Court, the appellant briefed and argued two points: The first was that "Memoirs of Hecate County" is not an obscene book; the second point was that: "Section 1141 of the Penal Law, as applied by the court below to this defendant and to 'Memoirs of Hecate County,' violates both the Federal and State Constitutions." In the latter point, it was argued at length that the statute, as construed and applied, abridged appellant's freedoms of speech and of the press in violation of the Fourteenth Amendment. The Appellate Division affirmed without opinion on May 16, 1947 (272 App. Div. 799).

The same two points were again briefed and argued upon the appeal to the State Court of Appeals. That court also

affirmed without opinion but, in its remittitur, set out the following:

> "Upon this appeal there was presented and necessarily passed upon a question under the Constitution of the United States, viz: The defendant argued that its conviction violated the right of freedom of speech guaranteed by the Fourteenth Amendment of the Constitution of the United States. This Court held that the conviction aforesaid did not violate the right of freedom of speech guaranteed by the Fourteenth Amendment of the Constitution of the United States."

The decision of the Court of Appeals has not yet been reported.

(c)

Appellant's motions at the trial and its briefs and arguments in the appellate courts of the State properly preserved its contention that the statute under which it was convicted, as construed and applied by the New York Court of Appeals in affirming the appellant's conviction, conflicts with the Fourteenth Amendment to the Constitution of the United States in that it denies and unduly restricts freedom of the press.

Moreover, the Court of Appeals considered and decided the appellant's contention that the statute, as construed and applied, was invalid under the Fourteenth Amendment. Its express statement to that effect complies with the requirement stated in *Lynch* v. *New York*, 293 U. S. 52 (1934). The Court of Appeals is the highest court of New York State. Its judgment finally affirms the appellant's conviction.

Accordingly, the question is properly before this Court. *Winters* v. *New York*, October Term, 1947, Docket No. 3, probable jurisdiction noted January 2, 1946; see also the

POOR COPY

BLEED THROUGH

first question framed by this Court when it ordered reargument in the *Winters* case on June 23, 1947.

Other authorities supporting jurisdiction are: *Cantwell* v. *Connecticut*, 310 U. S. 296, 301 (1940); *Stewart & Co.* v. *Sadrakula*, 309 U. S. 94, 97 (1940); *Home Ins. Co.* v. *Dick*, 281 U. S. 397 (1930).

The Federal Question Presented Is Substantial

The substantial question under the Federal Constitution presented on this appeal is: Whether a State statute, which denounces as a misdemeanor the publication and sale of an obscene book, may, consistently with the due process clause of the Fourteenth Amendment, be construed and applied so as to penalize the publication of a *bona fide* work of literature, when such work of literature involves no clear or present danger to the morals of the community. This question does not appear ever to have been presented to or decided by this Court.

That the freedoms of speech and of the press, which are expressly protected by the First Amendment from abridgment by Congress, are also protected by the due process clause of the Fourteenth Amendment from abridgment by the States is now thoroughly settled. *Pennekamp* v. *Florida*, 328 U. S. 331, 335 (1946); *Bridges* v. *California*, 314 U. S. 252, 263, 268 (1941); *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940); *Herndon* v. *Lowry*, 301 U. S. 242 (1937); *Gitlow* v. *New York*, 268 U. S. 652 (1925).

While it is recognized that these freedoms are not without their limitations, the general rule is that the power of a State to abridge them is the exception rather than the rule and "the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered. The limitation upon

individual liberty must have appropriate relation to the safety of the state. Legislation which goes beyond this need violates the principle of the Constitution." *Herndon* v. *Lowry, supra,* at p. 258.

The question presented by this appeal is whether New York has so construed and applied Section 1141 of its Penal Law as to transgress the bounds of its legislature's constitutional power. It should be noted that the appellant did not urge below and does not now urge that Section 1141 is invalid on its face. It may be said that, in so far as the statute prohibits the publication of commercial pornography, it finds justification in an appropriate relation to a substantive evil which the State has a right to prevent. But when construed and applied, as it was here, so as to prevent the publication of a *bona fide* work of literature, the statute fails to meet the test defined by this Court's decisions.

That test, although it has been stated in varying terms, is the classic clear and present danger test which, at least since *Schenck* v. *United States,* 249 U. S. 47 (1919), has been consistently applied by this Court to free speech and free press cases. The question in every such case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress or the State legislature has a right to prevent. It is a question of proximity and degree. *Schenck* v. *United States, supra,* at p. 52.

It is true that none of the recent leading cases has applied this now well-established principle to works of fiction. For obvious reasons, the issue has in the past been brought into boldest relief in cases which involve statements or expressions on subjects being currently debated, such as labor disputes, politics, economics, recent judicial decisions, etc. Cf. *Bridges* v. *California, supra,* pp. 268-269 (1941). But the principle is clearly equally applicable to works of fiction,

POOR COPY

BLEED THROUGH

many of which, like the one at bar, are simply an art form of commentary on an identifiable social *milieu*. "Uncle Tom's Cabin" and Voltaire's "Candide" were works of fiction which, under other circumstances, might well have sought and been entitled to the protection of the First and Fourteenth Amendments. "The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell* v. *Griffin*, 303 U. S. 444, 452 (1938).

Cases involving those works would surely have called for the application of principles recognized by this Court when, in *Thornhill* v. *Alabama*, 310 U. S. 88, 102 (1940), it quoted from the letter of the Continental Congress to the Inhabitants of Quebec to the effect that the importance of the freedom of the press consists, among other things, in "the advancement of * * * arts in general"; and when, in *Thomas* v. *Collins*, 323 U. S. 516, 531 (1945) it said: "And the rights of free speech and a free press are not confined to any field of human interest."

The New York Court of Appeals therefore had no basis for refusing to apply to the case at bar the rationale of decisions of this Court governing a wide variety of utterances and publications, including publications alleged to have interfered with the administration of justice, *Bridges* v. *California*, *supra*; *Pennekamp* v. *Florida*, *supra*; *Craig* v. *Harney*, 331 U. S. 367 (1947); utterances alleged to have invoked a breach of the peace, *Cantwell* v. *Connecticut*, *supra*; utterances alleged to have violated statutes dealing with incitement to insurrection, *Herndon* v. *Lowry*, *supra*; speeches made by a union organizer in violation of a statute requiring a license to act as such, *Thomas* v. *Collins*, *supra*; and publications, the distribution of which is declared by statute to be a nuisance, *Lovell* v. *Griffin*, *supra*.

In *Bridges* v. *California*, *supra*, the Court examined the clear and present danger rule and concluded that the "mini-

mum compulsion" of the Bill of Rights was "that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished" (at p. 263); the guaranty of freedom of the press must be given "the broadest scope that could be countenamed in an orderly society" (at p. 265). In that case, the petitioners had been punished for contempt for publishing comments on matters pending before a State court. The California courts had found in the publications a "reasonable tendency" to interfere with the orderly administration of justice. This Court held such finding unwarranted and, even if warranted, not a sufficient basis to restrict free expression. Applying these principles in *Pennekamp* v. *Florida, supra,* and in *Craig* v. *Harney, supra,* the Court went even further and reversed findings of each of the State courts that a clear and present danger had in fact been created. "We conclude that the danger under this record to fair judicial administration has not the clearness and immediacy necessary to close the door of permissible public comment" (328 U. S. at pp. 349-350).

The fact that these "contempt" cases were decided in the State courts under common law and not under any statute does not detract from their value as precedents for the instant appeal. This was made clear in *Cantwell* v. *Connecticut, supra,* in which the Court considered a conviction for the common law offense of inciting a breach of the peace, alleged to have been committed by the distribution of religious pamphlets and by the playing of phonograph records on the public streets. This situation, said the Court, was "analogous to a conviction under a statute sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application" (at p. 308). The appellant here was convicted under just such a statute and the question is whether the New York

POOR COPY

BLEED THROUGH

State courts violated the Federal Constitution when they refused to construe it as one "narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the state." (cf. 310 U. S. at 311).

Other recent decisions of this Court have uniformly stricken down convictions based upon statutes which were deemed to have been applied so broadly as to condemn conduct not constituting such a clear and present danger. In *Herndon* v. *Lowry, supra,* the appellant was convicted of the statutory crime of attempting to incite insurrection. The "crucial question" was held to be "not the formal interpretation of the statute by the Supreme Court of Georgia but the application given it" (at p. 260). *Gitlow* v. *New York, supra,* was held to be no warrant for the contention "that under a law general in its description of the mischief to be remedied and equally general in respect of the intent of the actor, the standard of guilt may be made the 'dangerous tendency' of his words" (at p. 258).

In *Thomas* v. *Collins, supra,* the conviction was for contempt in violating a State court order which enjoined solicitation to membership in a labor union. The order had been made under a statute which prohibited such solicitation without the prior obtaining of a card from the State authorities. This Court reversed because the statute, as applied, punished the appellant for making a speech to a union meeting (323 U. S. at p. 536).

In the instant case, the statute could hardly be more general in its description of the mischief to be remedied. Nor can it be said that interpretative decisions of the New York courts have served to render it any less general. In no case which we have been able to find have the New York appellate courts ever employed it, as they have here, to suppress a work of *bona fide* literature. Quite to the contrary, they seem consistently to have taken pains, when affirming con-

victions under the statute, to point out that the work involved had no literary merit. *People* v. *Pesky*, 230 App. Div. 200, aff'd, 254 N. Y. 373 (1930); *People* v. *Berg*, 241 App. Div. 543, aff'd, 269 N. Y. 514 (1935); *cf. Halsey* v. *New York Society*, 234 N. Y. 1 (1922); and see *People* v. *Winters*, 294 N. Y. 545 (1945) which involved *subsection 2* of section 1141 of the Penal Law and which is now pending decision on direct appeal to this Court after several arguments, *Winters* v. *New York*, October Term, 1947, Docket No. 3, probable jurisdiction noted, January 2, 1946.

Yet the State argued in the courts below and they appear to have held that the work here in question fell afoul of the statute because of its *dangerous tendency* "to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a work of this sort may fall." This was a test derived not from the common law but from an 1868 decision of the British Queen's Bench (*Regina* v. *Hicklin*, 3 Q. B. 360), and since thoroughly discredited by the Federal courts, *United States* v. *One Book Entitled Ulysses*, 72 F. (2d) 705 (C. C. A. 2, 1934); *United States* v. *Levine*, 83 F. (2d) 156 (C. C. A. 2, 1936); *Parmelee* v. *United States*, 113 F. (2d) 729 (App. D. C. 1940).

There was no proof or offer of proof below that the alleged danger was so clear or immediate as to justify suppression of publication. Indeed, the courts below never gave any indication at any time that they were aware of the grave constitutional objection involved. They appear to have wholly ignored "the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment" and to the fact that such "priority gives these liberties a sanctity and a sanction not permitting dubious intrusions," *Thomas* v. *Collins*, *supra*, at p. 530. They seem to have been unaware of "the delicate

POOR COPY

BLEED THROUGH

and difficult task" which "falls upon the courts to weigh the circumstances and to appraise the susbtantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights" of freedom of speech and of the press, *Schneider* v. *State*, 308 U. S. 147, 161 (1939).

In pointing this out, the appellant is not unmindful of the dictum of *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571-572 (1942) to the effect that certain "well-defined and narrowly limited" classes of *speech* have no constitutional protection and that these include "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words —those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." But this quotation, when read in the context of a case involving the utterance of insulting epithets upon the public streets, can have no application to a book, a few pages of which are devoted to an explicit discussion of sex. More applicable would be the principles enunciated by Thomas Jefferson when he rejected the depraving of the public taste as a ground for interfering with the freedom of the press, see *Bridges* v. *California, supra*, note 16. Moreover, it should be noted that the Court in the *Chaplinsky* case cited as authority for the quoted words Professor Chafee's work, *"Free Speech in the United States,"* whereas the same author, in a later work, has elaborated his views and has argued for the constitutional protection of genuine literature from prosecutions for obscurity. Chafee, *Government and Mass Communications* (1947), pp. 59-60.

Since *Gitlow* v. *New York*, 268 U. S. 652 (1925), in which it was first recognized that the Fourteenth Amendment protects against abridgment by the States of freedom of the press, this Court has never passed upon the validity of a conviction for publication of an allegedly obscene book,

where the book so accused was a recognized work of literature. There is now no proper guide for the performance of the delicate task involved in the judging of such a work.

It is peculiarly appropriate that such a guide be delineated at this time and in this case. Now, when the frontiers of suppression are being everywhere extended, this Court will want to consider whether art forms of expression are to be relegated to the role of stepchildren of the First Amendment. Surely the right of free expression in the course of exploration of an expanded universe and the mystery of man cannot be limited to editorial writers, pamphleteers, labor organizers and itinerant ministers and denied to serious literary artists. New York State, the center of the book publishing industry, has in this case allied itself with forces of suppression. It has suppressed a book (and has threatened with imprisonment anyone who sells it in the future) which has been recognized by the literary world as an effective satire on may facets of the lives of the suburbanites of the 1920's and early 1930's. In the form of fiction, the book has commented bitterly on the tastes and politics of that era. In order to present what he thought was a complete picture of a particular social *milieu*, the author has seen fit to devote a few pages of his book to several explicit references to the sexual act. We are confident in suggesting that, when the Court comes to examine the book, it will fail to find in it any basis for a conclusion that it represents an imminent or serious threat to anybody's morals.

This case gives the Court an opportunity to stem further the tide of suppression by recognizing that the First Amendment extends to serious literary expression as well as to other forms. And that question must be considered substantial so long as the channels of enlightenment are to be kept open.

BLEED THROUGH

POOR COPY

Conclusion

WHEREFORE it is respectfully submitted that this appeal in the above entitled cause comes within the proper jurisdiction of this Court.

(Sgd.) WHITNEY NORTH SEYMOUR,
Counsel for Appellant.

APPENDIX

COURT OF SPECIAL SESSIONS OF THE CITY OF NEW YORK, NEW YORK COUNTY

PEOPLE OF THE STATE OF NEW YORK

against

DOUBLEDAY & COMPANY, INC.

Opinion of JUSTICE NATHAN D. PERLMAN:

I am inclined to accept the position taken by the prosecution that the story "The Princess with The Golden Hair" may be considered separately and apart from the rest of the book "Memoirs of Hecate County."

The crucial consideration is the standard to be applied by the court, the concept of obscenity against which the story in question must be tested.

The prosecution would have obscenity defined as that which tends to deprave and corrupt the young and immature, those whose minds are open to such immoral influences and into whose hands the book may fall. I find that concept grossly inadequate and, in fact, detrimental to the best interests of the general public.

Such a standard would exclude from consideration the effect of a story or book on the minds of the mature, those who are not open to such immoral influences. These latter, the bulk of the reading public, must in their daily lives, face, understand and resolve the complex problems of modern life and society. In this connection they have traditionally relied on those artists and writers who possess an acute and sensitive insight into those problems and an ability to convey that insight through the written word.

To adopt a standard of obscenity which would disregard the interests of the mature and ignore the positive and vital contribution which books can make in their lives, is to needlessly sacrifice the welfare of a vast portion of our community. I am confident that such was not the intention of the legislature. Section 1141 of the Penal Law, as every other statute, is fundamentally intended to benefit and pro-

POOR COPY

BLEED THROUGH

tect society as a whole. Consequently it is reasonable to take into account in each case the varied effects of the book or story in question. Any rational evaluation of a book from the point of view of obscenity must give consideration not only to its detrimental tendency to deprave the minds of the young and immature but also to its beneficial tendency to enlighten the mature.

It was this latter aspect which led United States Circuit Judges Augustus N. Hand and Learned Hand and United States District Judge John M. Woolsey in the Ulysses case to place so much stress on the truth, sincerity and art qualities of the book there under consideration. These Judges weighed carefully the standard now urged by the prosecution in the instant case and rejected it. (United States *v.* One Book Called "Ulysses", 72 Fed. 2nd 705; 5 Fed. Supp. 182.)

Giving due weight and consideration to the artistic impact of "The Princess with The Golden Hair" and judging that story as a whole, irrespective of certain passages which by themselves might have a tendency to deprave the young and immature, I find that the story is not obscene within the meaning of Section 1141 of the Penal Law.

The writer of the story is evidently and honestly concerned with the complex influences of sex and of class consciousness on man's relentless search for happiness. That is a problem which is also of deep concern to the matured reading public. That public is entitled to the benefit of the writer's insight and that right may not be lightly disregarded by excluding from consideration all interests but those of the young and immature.

To suppress what may appear bad in a book is also to suppress what is good therein. The Court's primary duty is to interpret all laws in the terms of the general welfare.

I vote to acquit the defendant.

(Sgd.) NATHAN D. PERLMAN,
Justice of the Court of Special Sessions of the City of New York.

FILE COPY

Office - Supreme Court, U. S.
FILED
FEB 4 1948
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 559 11

DOUBLEDAY & COMPANY, INC.,
Appellant,

vs.

PEOPLE OF THE STATE OF NEW YORK

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

WHITNEY NORTH SEYMOUR,
Counsel for appellant.

POOR COPY

INDEX

SUBJECT INDEX

	PAGE
Preliminary Statement	1
The Book	1
The Federal Question Presented Is Substantial	3
Conclusion	5

CITATIONS

CASES:

Bridges v. *California*, 314 U. S. 252, 265 (1941)	4
Chaplinsky v. *New Hampshire*, 315 U. S. 568 (1942)	4
Rebuhn v. *Cahill*, 31 F. Supp. 47 (S. D. N. Y. 1939)	4
Robertson v. *Baldwin*, 165 U. S. 275 (1897)	4
Schenck v. *United States*, 249 U. S. 47 (1919)	4

OTHER AUTHORITIES:

Cooley's *Constitutional Limitations* (8th Ed.), p. 886	4
The United States Quarterly Book List (Vol. 2, No. 3, September, 1946)	2

BLEED THROUGH

POOR COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 539

DOUBLEDAY & COMPANY, INC.,

Appellant,

vs.

PEOPLE OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

The nature of the case and the other considerations which sustain jurisdiction of this appeal have already been fully set forth in appellant's Statement as to Jurisdiction. Since that statement was prepared, the decision below of the Court of Appeals has been reported in 297 N. Y. 687.

The Book

The judgment below affirmed a conviction of the appellant for publishing and selling "Memoirs of Hecate County," by Edmund Wilson. That book is a serious work of *bona fide* literature, recognized as such by the literary world and commented upon seriously by contemporary experts in the field.

In support of its motion to dismiss or affirm, the appellee has seen fit to summarize the book in a fashion which we

consider to be a grotesque distortion of the whole. Upon the argument of this appeal, the appellant will have occasion to direct the Court's attention to the book itself and to the many criticisms and summaries of it which were published contemporarily. For purposes of this motion it may suffice to quote the review published by the Library of Congress in *The United States Quarterly Book List* (Vol. 2, No. 3, September, 1946, at p. 183), a highly selective publication designed to give notice to the other American republics of recently issued books of a scientific, historical, literary or artistic nature (see *ibid.*, p. iii):

> "Wilson, Edmund. Memoirs of Hecate County. Garden City, N. Y., Doubleday. 338 p. 20 cm. $2.50. 46-2116.
>
> "Described on the dust jacket as 'fiction,' these loosely related chronicles bear internal evidence that they are to some extent reflective and critical autobiography. All have in common characters summering in Hecate County, an imagined well-to-do suburban colony near New York.
>
> "Although all the pieces have the style of the polished and subtle raconteur, the tone and subject matter vary from social reporting to fantasy. Consequently, the reader may at times find himself speculating upon the sources of Mr. Wilson's data instead of devoting himself to the book as a work of art. Three of the stories have been published before. Of these, The Man Who Shot Snapping Turtles tells of a sinister esthete who descends from campaigning to protect ducks as objects of beauty to exploiting their natural enemies, snapping turtles, for financial gain. In Ellen Terhune, the character of a woman composer is discovered and accounted for through the fantasy of visits into her family past.

POOR COPY

BLEED THROUGH

"Of the new sketches, The Princess with the Golden Hair fulfills best the statement of the jacket —'the adventures of an egotist among the bedeviled.' Essentially, this is a story of seduction, disappointment, and failure, upon the part of the egotist, to face up to any reality when his ideals collapse. The contrast between Imogen, the princess, and Anna, the proletarian, is perhaps too doggedly pursued; the seduction scenes are purposely almost clinical in their physical detail. The total effect of the story, however, derives from the self and social analysis, more courageous than smug.

"The Milhollands and Their Damned Soul is a knowing satire on the industrialization of publishing, and its ramifications in book selection clubs, book reviewing, and advertising. As a whole, the MEMOIRS satirize a relatively small but influential group who consider themselves an intellectual and cultural elite.

"Wilson, Edmund. Born 1895. Educated at Princeton University, A. B., 1916. Member of staff, *The New Yorker*. Publications: I THOUGHT OF DAISY, 1929; AXEL'S CASTLE; a study in the imaginative literature of 1870-1930, 1931; TO THE FINLAND STATION; a study in the writings and acting of history, 1940; and other works."

The Federal Question Presented Is Substantial

Appellant, in its Statement as to Jurisdiction, has already set out in some detail the reasons why the federal question here presented is a substantial one. To restate the point briefly: the statute under consideration, as construed and applied by the courts below, deserves the consideration of this Court in the light of the fact that the clear and present danger test has now become the well settled working prin-

ciple to be used in applying the prohibitions of the First Amendment and it was not applied below.

The appellee's statement in support of its motion to dismiss or affirm makes no reference whatever to the clear and present danger test. Other than *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942), which has already been treated in the Statement as to Jurisdiction (p. 13), it cites no decision of this Court dealing with that test.

The only other decision of this Court cited, *Robertson* v. *Baldwin*, 165 U. S. 275 (1897), concerned the constitutionality of an act conferring on state courts the power to apprehend deserting seamen. Except for *Rebuhn* v. *Cahill*, 31 F. Supp. 47 (S. D. N. Y. 1939), all the lower federal court decisions upon which the appellee relies were decided before the enunciation of the clear and present danger test, *Schenck* v. *United States*, 249 U. S. 47 (1919), and none involved a serious work of *bona fide* literature. The *Rebuhn* case was a suit to restrain prosecution of an indictment and the comments there made with respect to freedom of the press took no cognizance of the test which we urge should be applied on this appeal.

Finally, the very citation by the appellee of Cooley's *Constitutional Limitations* (8th Ed.), p. 886, emphasizes the substantial nature of the constitutional question here presented. For Professor Cooley's remarks on the subject of blasphemy, obscenity, etc. were based upon his theory that the great liberties protected by the First Amendment are limited only to the area covered by "the common-law rules which were in force when the constitutional guaranties were established." And that theory, we believe, has been thoroughly discredited and laid to rest by this Court in *Bridges* v. *California*, 314 U. S. 252, 265 (1941).

POOR COPY

BLEED THROUGH

Conclusion

The very dearth of authority cited in appellee's moving papers thus serves to underscore the point upon which we have expounded more fully in appellant's Statement as to Jurisdiction. That is: that this case presents a timely and grave constitutional issue which has never before been presented to this Court. It should be entertained and considered in the light of the recent monumental strides made by this Court in the development of the law governing the freedoms guaranteed by the First Amendment.

The motion to dismiss or affirm should be denied.

Respectfully submitted,

WHITNEY NORTH SEYMOUR,
Counsel for appellant.

February 3, 1948

FILE COPY

Office - Supreme Court, U. S.
FILED
OCT 5 1948
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1948

No. 11

DOUBLEDAY & COMPANY, INC.,
Appellant,

vs.

THE PEOPLE OF THE STATE OF NEW YORK

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR APPELLANT

WHITNEY NORTH SEYMOUR,
Counsel for appellant.

GEORGE G. GALLANTZ,
JAMES F. DWYER,
NEWELL G. ALFORD, JR.,
of Counsel.

SUBJECT INDEX

	PAGE
Opinion below	1
Jurisdiction and statute involved	1
Statement	2
"Memoirs of Hecate County" by Edmund Wilson	4
The manner in which the book was offered to the public	6
Critical comment	8
(a) The book as a whole	8
(b) Passages complained of by the State	9
(c) The author	11
Specification of assigned errors to be urged	12
Summary of argument	13
Argument	
No suppression of any utterance can be constitutionally justified unless that utterance gives rise to a clear and present danger to some substantial interest of the State. Public discussions of sex are not excluded from this general rule and "Memoirs of Hecate County" does not give rise to any danger, either clear or present, that it will subvert order or morality	14

PAGE

(a) The recent decision in *Winters* v. *New York*, 333 U. S. 507 (1948) establishes that the protection of the First Amendment applies to works of fiction 16

(b) The Fourteenth Amendment, as uniformly construed by this Court since 1925, prohibits the suppression of utterances unless they create a clear and present danger to some substantial interest of the State. This Court has never held that discussions of sex conduct, or any other class of utterances, constitute an exception to this rule 18

(c) Neither the history of the First Amendment, nor any other reason or authority, requires or would justify the Court in now holding that discussions of sex conduct constitute an exception to the "clear and present danger" rule 27

(d) The statute here has been neither narrowly drawn nor narrowly construed to punish specific conduct 37

Conclusion 52

BLEED THROUGH

POOR COPY

CITATIONS

CASES: PAGE

Bridges v. *California*, 314 U. S. 252 (1941) .21, 26-27, 31

Cantwell v. *Connecticut*, 310 U. S. 296 (1940) . .23-25, 33
Chaplinsky v. *New Hampshire*, 315 U. S. 568 (1942) 25, 33-34
Craig v. *Harney*, 331 U. S. 367 (1947).....23, 52

Ex parte Jackson, 96 U. S. 727 (1877) 33

Gitlow v. *New York*, 268 U. S. 652 (1925) 16, 17

Hannegan v. *Esquire*, 327 U. S. 146 (1946).....33, 35
Halsey v. *New York Society*, 234 N. Y. 1 (1922) 41-42, 48
Herndon v. *Lowry*, 301 U. S. 242 (1937) . .20-21, 38, 50

Minersville District v. *Gobitis*, 310 U. S. 586 (1940) 19

Near v. *Minnesota*, 283 U. S. 697 (1931) 33

Parmelee v. *United States*, 113 F. (2d) 156 (App. D. C., 1940) 33, 35
Pennekamp v. *Florida*, 328 U. S. 331 (1946) 23
People v. *Berg*, 241 App. Div. 543 (1934), affd. 269 N. Y. 514 (1935) 45-46, 47, 48
People v. *Brainard*, 192 App. Div. 816 (1920).... 41
People v. *Eastman*, 188 N. Y. 478 (1907) 15, 31, 40-41, 49
People v. *Fellerman*, 243 App. Div. 64 (1934); affd. 269 N. Y. 629 (1936) 46
People v. *Gotham Book Mart, Inc.*, 158 Misc. 240 (1936) 48
People v. *Miller*, 155 Misc. 446 (1935) 45
People v. *Muller*, 96 N. Y. 408 (1884) 32, 39-40

CASES:

PAGE

People v. *Pesky*, 230 App. Div. 200; affd. 254 N. Y. 373 (1930) 42-43
People v. *Viking Press, Inc.*, 147 Misc. 813 (1933) . 44-45
People v. *Wendling*, 258 N. Y. 451 (1932) 43-44
People v. *Winters*, 294 N. Y. 545 (1945) 35, 49

Queen v. *Read*, Fort. 98, 11 Mod. 142 (Q. B. 1708) . 31

Regina v. *Hicklin*, L. R. 3 Q. B. 360 (1868) 31, 32, 35, 40, 48, 50
Rex v. *Curl*, 2 Str. 789, 1 Barn. 29 (K. B. 1727) ... 31
Rex v. *DeMontalk*, 23 Crim. App. Rep. 182 (1932) . 36
Rex v. *Wilkes*, 4 Burr. 2527 (K. B. 1770) 31

Saia v. *New York*, 334 U. S. 558 (1948) 51
Schneider v. *State*, 308 U. S. 147 (1939) 20

Thomas v. *Collins*, 323 U. S. 516 (1945) 22
Thornhill v. *Alabama*, 310 U. S. 88 (1940) 21, 51

United States v. *Bennett*, Fed. Case No. 14,571, 24 Fed. Cas. 1093 (S. D. N. Y., 1879) 32
United States v. *Kennerley*, 209 Fed. 119 (S. D. N. Y., 1913) 33, 35
United States v. *Levine*, 83 F. (2d) 156 (CCA 2, 1936) 33, 48
United States v. *One Book Entitled Ulysses*, 72 F. (2d) 705 (CCA 2, 1934) 33, 47

Winters v. *New York*, 333 U. S. 507 (1948) 16, 17, 25, 33, 34-35, 38

STATUTES:

New York Penal Law, Subdivision 1 of Section 1141 ..... 1, 14-16, 31, 50
20 & 21 Victoria, Section 1 of Chapter 83 32

POOR COPY
BLEED THROUGH

OTHER AUTHORITIES: PAGE

Alpert, *Judicial Censorship of Obscene Literature*, 52 Harv. L. Rev. 40 (1938) 31, 48-49

Bradley, *On the Treatment of Sexual Detail in Literature*, 2 Collected Essays 619 (1935) 37

1 Chafee, *Government and Mass Communications* (1947) 34

Cowley, book review, *New Republic*, March 25, 1946 8

De Jong, book review, *Knickerbocker Weekly*, July 22, 1946 ..... 10, 12

Dewey, *Art as Experience* (1934) 35

Dictionary of American Biography 30

Grant and Angoff, *Massachusetts and Censorship*, 10 B. U. Law Rev. 146 (1930) 31

146 Hansard's *Parliamentary Debates* (3rd series, 1857) 32

Ingersoll's "The Influence of America on the Mind" (1823) 30

Jefferson's Second Inaugural Address (1805) 28-29

Jefferson's letter to N. Dufief, April 19, 1814 29

Kazin, book review, *Partisan Review*, Summer 1946 ..... 9, 11, 12

2 *Kent's Commentaries* (1827) 29

Madison's Report on the Virginia Resolutions 28

Nobbe, *The North Briton* (1939) 31

Poore, book review, *New York Times*, March 7, 1946 12

Richmond, book review, *Tomorrow*, June 1946 9, 10-11, 12

OTHER AUTHORITIES: PAGE

Smith, book review, *Saturday Review of Literature*, March 23, 1946 12

Stephen, *Digest of the Criminal Law* (1877) 36

3 *Story's Commentaries* (1833) 29

Time, book review, March 25, 1946 8-9

2 *Tucker's Blackstone* (1803) 30

United States Quarterly Book List, September, 1946 ..... 8, 10

24 *Who's Who in America* 11

POOR COPY

BLEED THROUGH

Supreme Court of the United States

OCTOBER TERM, 1948

DOUBLEDAY & COMPANY, INC., *Appellant,* *vs.* THE PEOPLE OF THE STATE OF NEW YORK	No. 11

BRIEF FOR APPELLANT

Opinion Below

The three-judge court which tried this case without a jury in the Court of Special Sessions of the City of New York decided for conviction of the appellant by a two to one vote. The majority wrote no opinion. The dissenting justice wrote an opinion (R. 47-48) which is unreported.

The Appellate Division of the New York Supreme Court and the New York Court of Appeals each affirmed without opinion. Their decisions are reported respectively at 272 App. Div. 799 and 297 N. Y. 687.

Jurisdiction and Statute Involved

The appellant was convicted of violating subdivision 1 of section 1141 of the New York Penal Law (New York Laws of 1909, Ch. 88, as amd. by Laws of 1941, Ch. 925) in that it published and sold an "obscene" book, namely, "Memoirs of Hecate County", by Edmund Wilson. The statute in question, so far as material, reads as follows:

> "A person who sells * * * or has in his possession with intent to sell, lend, distribute or give away, or to show * * * any obscene, lewd, lascivious, filthy, indecent or disgusting book * * * or who * * * prints, utters, publishes, or in any manner manufactures, or prepares any such book * * * Is guilty of a misdemeanor * * *."

The judgment below was a final judgment rendered by the highest court of the State of New York in which a decision could be had. The appellant contended that the above quoted statute, as construed and applied to it, was invalid because repugnant to the Constitution of the United States. The decision of the State court was in favor of the statute's validity (R. 60-61; 297 N. Y., at p. 688).

Jurisdiction of this appeal was conferred by the provisions of Section 273(a) of the Judicial Code of 1911, formerly 28 U. S. C. § 344(a), but since superseded by Title 28, United States Code, § 1257(2), effective September 1, 1948.

Probable jurisdiction was noted on March 15, 1948 (R. 67).

Statement

The appellant stands convicted of having published and sold a book. By virtue of that conviction it has been compelled to pay a fine of $1,000 (R. 46) and has been admonished by the trial court that any future publication or sale of this book would constitute a violation of the "established law * * * of New York City", punishable by a one-year prison term (R. 43).

It has become a commonplace that the Fourteenth Amendment prohibits the States from taking any action

POOR COPY

BLEED THROUGH

which abridges the freedom of the press and, *prima facie*, it is hard to conceive of a clearer act of abridgment of that great freedom than is involved in the judicial act of punishment for the publication of a book. Such a judicial act is, however, here to be reviewed and, although the grave constitutional implications of that act were urged before the trial court (R. 14, 38, 39, 45) and before two higher State courts, this Court unfortunately does not have the benefit of any expression of views from the State courts which would even tend to justify this abridgment under the decisions of this Court as to the broad sweep of the First Amendment.

The evidence, upon which the conviction rests, consists only of the book itself and of the appellant's concession that it published and sold the book to a representative of the Society for the Suppression of Vice (R. 11-14).

The two informations upon which the appellant was tried described the book as "obscene" (R. 4), and the appellant was found guilty by a majority consisting of two justices (R. 42). Thus, the judicial act under review must be justified, if it can be justified at all, upon the basis of an implied finding that a mere reading of the book led to the conclusion that it is "obscene", even though the law of New York nowhere contains any adequately narrow definition of that word.

It will not here be urged that the great breadth of the freedom of the press is of such dimension that it includes the freedom to publish obscene writings, so long as that term is narrowly defined and applied. The appellant will, however, contend that any definition of the word "obscene", so broad as to catch up a bona fide work of literature, may not constitutionally be applied to prohibit the publication

of such a work. That "Memoirs of Hecate County", the book here in question, is a bona fide work of literature and not commercial pornography, cannot be seriously disputed. Its content, the manner in which it was published and offered for sale, the eminence of its author and the comment with which it was received by the literary world, all serve to underscore the inescapable conclusion that it is a serious work of literature which, under the protection of the Constitution, its author was entitled to write and the public was entitled to read.

"Memoirs of Hecate County," by Edmund Wilson

Since the only evidence offered against the appellant consisted of the book itself, this Court will find it impracticable to consider the issues now before it without reading the book in its entirety. In these circumstances, no detailed description of the book will be attempted.

Briefly, the book consists of six interrelated stories. In the language of one eminent literary critic, who testified for the appellant, it is largely a satirical work which undertakes to characterize the quality of modern culture and modern civilization in several literary groups. It makes a rather stern and severe judgment on what is happening in our modern culture (R. 29). The figure of the devil appears frequently in the book—sometimes as a political character, sometimes as a literary character, but always as a functioning character. The devil is portrayed as representing forces of egoism, pride, vulgarity and surrender of moral integrity (R. 30).

The literary method of the book is not a conventional one. Its efforts to deride the immorality of the upper middle class in suburban New York during the period

POOR COPY

BLEED THROUGH

between the two World Wars is made, not by means of the more frequently used running narrative, but by means of a nightmarish satire on American suburban life cast in the form of detached but interdependent stories. One is in the form of a parable; another takes the form of a series of visions of past events; a third is chiefly devoted to a conversation with a man who identifies himself as the devil. Taken as a whole, the book is a series of studies of the impotence and corruption of an identifiable social milieu.

The first story, "The Man Who Shot Snapping Turtles", is the parable. In a brief and biting satire, it presents one Stryker, who first seeks to protect his ducks, which he described as creatures of God, from the attacks of snapping turtles. Frustrated in that effort, Stryker then decides to exploit the turtles by commercializing them. Finally he is killed by the rifle he had once used to destroy the turtles.

"Ellen Terhune" is the story told through a series of visions of the past. It portrays the artistic strivings of a woman whose parents' ambitions and domestic difficulties cause her ultimate frustration.

"Glimpses of Wilbur Flick" presents Flick as a wealthy playboy who drifts in a functionless life through alcoholism and narcotics, through psychoanalysis, fascism, and finally communism.

"The Princess with the Golden Hair" is a story of sexuality and promiscuity, skillfully told. Its central character is an esthete, an egotist who fails to see in himself the very frustrations which he has so carefully chronicled in others. The story's two other chief characters are women whose personalities and backgrounds the author expertly contrasts. The male protagonist is pictured as devoting almost all his time and thought to the sexual conquest of both women

alternately. But the point the story brings home to the reader is the futility of such a life and of the fact that the conquest, even when achieved, affords the hero not even fleeting happiness.

"The Milhollands and Their Damned Soul" is a satire on book clubs, book publishers, and the highly commercialized methods used by them to stereotype the tastes of the public.

It is the last story, "Mr. and Mrs. Blackburn at Home", in which the devil appears in the role of a wealthy suburbanite and expounds his derogatory views on both Hitler and Stalin, but suggests also that there is much opportunity for the devil's work in America. The book ends on a note of continued frustration as the narrator finally relapses into the compromised existence in which he has always lived.

The Manner in Which the Book Was Offered to the Public

The book here under consideration was not a pamphlet devoted to pornography and prepared for sale under the counter. It was a serious work of a serious author treating an important subject. It was bound and marketed in the usual manner. Its dust jacket did not call attention to the few passages to which the State has since taken objection. On the contrary, its announcement read: "This brilliant work of fiction describes the adventures of an egotist among the bedeviled."

The flyleaf of the dust jacket described the book in the following terms:

POOR COPY

BLEED THROUGH

"MEMOIRS OF HECATE COUNTY is a series of interrelated chronicles about a group of suburbanites, typical of the generation so glibly called 'lost.' Under Mr. Wilson's scrutiny they take on a new dimension, and that term no longer describes them. Lost they are, but they are also bedeviled. Evil is a positive power in their universe, and this is the keynote to their spectacular failure.

"One of the stories in this book is 'The Man Who Shot Snapping Turtles,' a masterpiece of macabre irony in which a man who conquers and turns to success his greatest mania is at last defeated and destroyed by it. 'Glimpses of Wilbur Flick' is the story of a spoiled rich man looking for an excuse for his existence. Success, when it comes, is ephemeral and we see him in the end supporting a group of ineffectual left-wing intellectuals—the last resort of a rich man's sense of guilt.

"All are about the American middle class between wars which has often been analyzed in fiction but never with the detachment and finality that Edmund Wilson achieves in this brilliant work."

The book's publisher—the appellant here—far from being a fly-by-night anonymous publisher of bawdy leaflets, was and is a leader in the field of publication of serious literary works. Its reputation is beyond dispute and was fully developed at the trial (R. 16-18). Some of its advertisements of this book have been reproduced in the transcript (R. 46A-46E) and they, too, show that no reference whatever was ever made by the publisher to the features of the book which led the State to seek its suppression.

Critical Comment

(a) The Book As a Whole

As part of the appendix to this brief we have compiled a collection of comments made concerning "Memoirs of Hecate County" by some of the leading periodicals which customarily deal with literature. It is not suggested that the appraisals contained in this appendix represent the unanimous views of all the critics who reviewed the book. The collection does show, however, that the book was invariably received as a significant literary work.

Probably the most important among the reviews included is one published in the *United States Quarterly Book List*, a publication of the Library of Congress, and for all the contents of which "the Library of Congress assumes full responsibility". This "highly selective" list has as its purpose "to make known the current literary, learned, and scientific contributions of the United States" and it is significant that "Memoirs of Hecate County" was included among them. Those concerned with directing the attention of the world to important American cultural achievements surely would not include a book which could fairly be called obscene. The review included is brief and no quotations from it are necessary here.

Some of the comments on the book as a whole which are to be found in the other reviews are worth noting. Malcolm Cowley in the *New Republic* summarized the book in these terms: "Morally it is the scene of a conflict between good and evil, in which evil is stronger and more personalized * * * and wins minor victories one after another, but never achieves a complete triumph." *Time* thought the book to be "the first event of the year which can be described as 'literary'. For it is more & more unusual

POOR COPY

BLEED THROUGH

for U. S. writers to try to produce literature which is serious without solemnity, entertaining without shallowness, intelligent without owlishness, socially observant without being dogmatically vindictive, morally acute without being mealymouthed." It "is pretty certainly the best contemporary chronicle, so far, of its place and period."

The suburban residents in the book "are described with brilliance, erudition, and keen insight". The stories are serious, "entertaining, intelligent, socially observant, and civilized. Mr. Wilson has written what appears to be the definitive book about a group of people who have failed both the world and themselves spectacularly." (John Richmond in *Tomorrow,* June, 1946.) Although Alfred Kazin (*Partisan Review,* Summer, 1946) thought Mr. Wilson's work "not a good book", he opened his lengthy commentary with the statement:

> "In its mordant analysis of our middle-class culture, in its pessimism and in the symbolic attempt of its hero to find his true class, this book resembles *The Education of Henry Adams.*"

and closed it with:

> "His book will live not because it is a work of imagination, but because it is a sourcebook in the sadness of Americans."

(b) Passages Complained of by the State

In the story, "The Princess With the Golden Hair", the author, in developing his theme, included several passages which describe in explicit detail the narrator's thoughts and experiences during the course of several sexual acts. As we understand it, the State has never claimed that the characters and acts described lacked

verisimilitude; nor that the story or descriptions were without literary merit; nor that the language of the questioned descriptions was profane. Reduced to its essentials the prosecution has been based solely upon the fact that in several brief passages of the book the relations between the sexes were treated with candor.[1] Many of the critics, however, did not consider the author's candor to be inappropriate to the subject matter of the book.

Long before this litigation was brought, the Library of Congress, after referring to the questioned passages, said: "The total effect of the story, however, derives from the self and social analysis, more courageous than smug." Dola De Jong took issue with those who thought the story "immature and pornographic". "It is rather the true picture of the American man in the stratum of society where people like Mr. Wilson linger. A world full of intellectual, egotistical and immature men, intelligent, emotionally starving society women, and lower class girls with a lot of dignity and sense, but forever victimized. * * * There may be people who buy *Memoirs of Hecate County* for the 'Purple' in it but in looking for those paragraphs they will have to read the book and there is a good chance that they will acquire a taste for good literature" (*Knickerbocker Weekly*, July 22, 1946). John Richmond suggested that the prurient may regard the passages as pornography but "sensitive, intelligent adults will recognize this story for more than a hauntingly beautiful descrip-

[1]In its brief to the trial court, the State made the additional point that the story contained no lesson in morality, that its chief character had not displayed any contrition or remorse. But in the appellate State courts the prosecution shifted its ground somewhat by saying that "the story attempts to express no moral judgment."

POOR COPY

BLEED THROUGH

tion of all the nuances and depths of a man's true love for a woman." Alfred Kazin commented that: "Nothing could be further removed from passion; or even neurotic conquest; or even from mechanical lechery."

The dissenting trial justice expressed a similar view (R. 48):

> "The writer of the story is evidently and honestly concerned with the complex influences of sex and of class consciousness on man's relentless search for happiness. That is a problem which is also of deep concern to the matured reading public. That public is entitled to the benefit of the writer's insight and that right may not be lightly disregarded by excluding from consideration all interests but those of the young and immature."

(c) The Author

Edmund Wilson is recognized as a leading American literary critic. He enjoys a worldwide reputation "perhaps higher than any other one critic" (R. 28). His earlier works have been acclaimed by the literary world and some are used as text books in literature courses given by leading universities (R. 28-29).[2]

---

[2]The current volume 24 of *Who's Who in America* contains the following sketch of Edmund Wilson's career: Reporter on the New York Evening Sun, 1916-17; mng. editor Vanity Fair, 1920-21; associate editor New Republic, 1926-31; book reviewer for the New Yorker since 1944. * * * Author: The Undertaker's Garland (with John Peale Bishop), 1922; Discordant Encounters (dialogues and plays), 1926; I Thought of Daisy (novel), 1929; Poets, Farewell! (verse), 1929; Axel's Castle (lit. criticism), 1931; The American Jitters—A Year of the Slump, 1932; Travels in Two Democracies, 1936; This Room and This Gin and These Sandwiches (plays), 1937; The Triple Thinkers, 1938; To the Finland Station, 1940; The Boys in the Back Room, 1941; The Wound and the Bow, 1941; Note-Books of Night, 1942; The Shock of Recognition (anthology), 1943.

Contemporary criticism recognizes Mr. Wilson as "the most perceptive and informed and implacable of contemporary American critics" (Charles Poore in the *New York Times*, March 7, 1946), one who "possesses the intellectual background, analytical faculties, the mind to dissect and reassemble the truth, the appreciation of originality and the feeling for logic that make the superb critic. * * * His latest fictional work, *Memoirs of Hecate County*, shows the same qualities as we mentioned above." (Dola DeJong in the *Knickerbocker Weekly*.) Much other comment is to the same effect. For example: "One of America's most distinguished literary critics" (John Richmond in *Tomorrow*, June, 1946); "the sharpest and most readable literary critic of our time" (Harrison Smith in the *Saturday Review of Literature*, March 23, 1946). Alfred Kazin in the *Partisan Review* (Summer, 1946) speaks of Mr. Wilson's talent as "so much like Henry Adams's, and like Adams's driven, by a longing for excellence, true aristocracy, and a social home."

A further measure of Mr. Wilson's stature may be found in the fact that an entire issue of the Princeton University Library Chronicle (volume V, number 2; February, 1944) has been devoted to him and his works.

Specification of Assigned Errors to be Urged

The appellant will urge all of the errors assigned (R. 63), namely, that the Court of Appeals of the State of New York erred in affirming the judgments of the lower State courts; in holding that the statute as construed and applied to appellant is not void or violative of appellant's rights under the due process clause of the Fourteenth Amendment because it

POOR COPY

BLEED THROUGH

abridges appellant's right to the freedoms of speech and of the press; in holding that the statute as so construed and applied did not deprive appellant of its property without due process of law; and in holding that appellant's conviction and punishment under the statute was not unconstitutional, illegal, void and of no effect under the due process clause.

Summary of Argument

That the First Amendment extends its protection to works of fiction as well as to works devoted exclusively to the exposition of ideas is now clear. Therefore, the only basis upon which the State of New York could attempt to suppress the publication of "Memoirs of Hecate County" was the fact that in several of its passages it frankly discusses sex conduct.

The general rule is that no expression upon any subject may be suppressed unless the expression gives rise to a clear and present danger to some substantial interest of the State, and unless the expression is uttered under circumstances affording no opportunity to test its merits by competition for acceptance in the market of public opinion. The question here is whether that general rule is to be limited so that only the single subject of sex conduct is to be excluded from its protection. Nothing in the history of the Bill of Rights and no other reason or authority warrants that such an exception be now delineated.

Assuming that no such exception exists and that discussions of sex conduct, like discussions of any other subject, are entitled to the full protection of the First Amendment, the question is whether the New York statute, as construed and applied here, was sufficiently narrowly defined to prohibit specific conduct. Such a narrow definition is to be

found neither in the earlier opinions of the New York State courts nor in the decisions rendered here without opinion. In any event, and regardless of the construction placed upon the New York statute in earlier cases, the statute is incapable of any construction which would authorize suppression of this bona fide work of literature without violating the Constitution.

This book is a bona fide work of literature because its main purpose is to comment with verisimilitude upon an identifiable social milieu as that milieu manifested itself during an identifiable period in an identifiable locality. The occasional explicit reference to the sexual act was merely incidental to the larger and concededly proper purposes of the publication, and there was no constitutional basis upon which any court could have arrived at a different conclusion.

Argument

NO SUPPRESSION OF ANY UTTERANCE CAN BE CONSTITUTIONALLY JUSTIFIED UNLESS THAT UTTERANCE GIVES RISE TO A CLEAR AND PRESENT DANGER TO SOME SUBSTANTIAL INTEREST OF THE STATE. PUBLIC DISCUSSIONS OF SEX ARE NOT EXCLUDED FROM THIS GENERAL RULE AND "MEMOIRS OF HECATE COUNTY" DOES NOT GIVE RISE TO ANY DANGER, EITHER CLEAR OR PRESENT, THAT IT WILL SUBVERT ORDER OR MORALITY.

In approaching discussion of the principles of constitutional interpretation which must be applied here, two basic facts must be kept in mind: First, we are not dealing with a statute narrowly drawn to define specific conduct. Subdivision 1 of section 1141 of the New York Penal Law

POOR COPY

BLEED THROUGH

speaks only of obscenity and of a long list of its synonyms[8] and leaves to the executive and judicial branches of the State the widest possible discretion in its application. Thus, the statute gives no information as to whether obscene writings are to be kept only from the young and immature; nor as to whether scientific works dealing with sex physiology are to be excepted from the reach of the statute; nor as to whether the prohibition is to be limited only to profane and other unconventional langauge.

Second, unlike the situation in most of the First Amendment cases which have come before this Court in recent years, we do not have in this case any clear guidance as to the limits of the "substantive evil" which the statute was designed to prevent. Thus, neither the statute itself, nor any authoritative interpretation of it, informs us whether it is designed only to prevent the suggestion of impure thoughts to the young and immature, or whether it is designed to shield the entire community from any discussion of sexual matters, or whether it is considered an effective instrument against incitement to sex crimes. Any one of these ends and many more are evils concerning which the legislature of the State may have had preferences or beliefs. But this Court, in the discharge of its historic function, must decide for itself whether the evil intended to be prevented can in fact support the penalizing of an utterance.

---

[8]See *People* v. *Eastman*, 188 N. Y. 478 (1907), in which the doctrine of *noscitur a sociis* was applied to the words "lewd, lascivious, filthy, indecent or disgusting" and in which it was said that the predecessor of section 1141(1) was "a declaration of the penalties to be imposed upon the various phases of the crime of obscenity." In no other New York decision has any meaning been given to the quoted words other than is generally given to the word "obscene".

And since the supposed evil itself is nowhere adequately defined, there is no basis upon which this Court could rest a conclusion that it is of sufficient weight, substance and seriousness to justify the restriction upon the freedom of the press which has been imposed here.

These two considerations alone would justify grave doubt as to the validity of the statute as it was construed and applied to this appellant and to this book. Moreover, we shall demonstrate in this brief that regardless of the nature of the evil which New York's legislature was attempting to avert when it enacted section 1141(1), the lower courts could not reasonably have concluded that the publication and sale of this book would endanger any paramount interest of the State. And, as a corollary to the development of that argument, we shall also show that there is no basis whatever for supposing that writings charged with being obscene were somehow impliedly excluded from the broad protection of the First Amendment.

a. The recent decision in *Winters* v. *New York*, 333 U. S. 507 (1948) establishes that the protection of the First Amendment applies to works of fiction.

This Court, in 1925, in *Gitlow* v. *New York*, 268 U. S. 652, recognized for the first time that the Fourteenth Amendment prohibits the States from abridging the freedoms of speech and of the press protected by the First Amendment. Since that decision, this Court has repeatedly reaffirmed that principle. But on almost all those occasions the Court was concerned with attempts by a State to interfere with utterances bearing on political, economic or religious issues.

POOR COPY

BLEED THROUGH

Only recently has the Court had occasion to lay to rest the contention "that the constitutional protection for a free press applies only to the exposition of ideas". With respect to that contention, the Court said, in *Winters* v. *New York*, 333 U. S. 507, 510 (1948):

> "The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature. Cf. *Hannegan* v. *Esquire*, 327 U. S. 146, 153, 158."[4]

This view is in harmony with the historic background of the constitutional protection of a free press. It was foreshadowed by the language of the letter from the Continental Congress to the Inhabitants of Quebec: "The importance of this [freedom of the press] consists * * * [in] the advancement of truth, science, morality and *arts* in general * * *."[5] (Italics added.)

With the decision in the *Winters* case, it has now become evident that the right of this appellant to publish and sell this book—even though it is a work of fiction—must be measured by the same principles which have governed the decisions involving attempts to restrict freedom of speech and of the press since the *Gitlow* case. Those decisions clearly demonstrate that the courts below were wrong in

---

[4]The sentence immediately following in the *Winters* opinion bears directly on the issues presented on this appeal but it will be treated at a subsequent point in this brief (*infra*, p. 33).

[5]Journal of the Continental Congress, 1904 Ed., vol. I, p. 104, at p. 108.

excepting the literary work involved here from constitutional protection by so construing and applying the New York statute as to suppress it.

b. The Fourteenth Amendment, as uniformly construed by this Court since 1925, prohibits the suppression of utterances unless they create a clear and present danger to some substantial interest of the State. This Court has never held that discussions of sex conduct, or any other class of utterances, constitute an exception to this rule.

The statute under which the appellant was prosecuted deals with "obscenity" and it has from time to time been erroneously assumed that the First Amendment, given its broadest possible scope, does not protect against prosecution for the publication of "obscene" utterances. Moreover, the lower courts here seem also to have assumed that "obscenity" includes everything dealing with the subject of sex. Such a view seems to have been based upon the further assumption—although our research has revealed no point at which it has ever been substantiated—that such utterances, in and of themselves, present some subtle danger to the State's interest in order and morality. But there is at least as much reason for believing that some threat to order and morality results from the banning of such utterances and from the publicity given to the activities of the Society for the Suppression of Vice and other volunteer censors (See Jefferson, as quoted in appendix to this brief, p. 38; Ingersoll, *ibid.*, p. 44; and Neilson, *ibid.*, pp. 54-55).

The State's legitimate interest in preserving order and morality cannot, of course, be doubted. But the mere exist-

BLEED THROUGH POOR COPY

ence of such a legitimate interest does not authorize a vague and dangerously expansive exception from the prohibition against abridgment of the freedom of the press. As the late Chief Justice Stone, dissenting, said in *Minersville District v. Gobitis*, 310 U. S. 586, 604-605 (1940):

> "History teaches us that there have been but few infringements of personal liberty by the state which have not been justified, as they are here, in the name of righteousness and the public good. * * * The framers were not unaware that under the system which they created most governmental curtailments of personal liberty would have the support of a legislative judgment that the public interest would be better served by its curtailment than by its constitutional protection."

The question here is not whether the legislature of New York State believed that morality would be better served by the suppression of a discussion of sexual subjects. The question is rather what, if any, danger has been threatened by the appellant's publication. And if it be assumed that such a danger existed, what was the nature and extent of that danger. Was it sufficiently grave to warrant suppression otherwise prohibited?

In the lower courts there was neither proof nor finding that any danger whatever existed, or even threatened. The decision of the trial court was a general finding of "guilty" without explanation. The State's appellate courts affirmed without elucidation. Aside from the constitutional infirmities inherent in a judgment entered without the support of such proof, there is nothing in this record to indicate that the State courts considered either the nature or the extent of the presumed danger or that such consideration was even deemed relevant.

Under the settled law, as enunciated by this Court, it would not even have been sufficient for the lower courts to find that the book did give rise to some danger. For when courts are called upon to except an utterance from the protection of the Constitution, they must undertake "the delicate and difficult task" of weighing the circumstances and of appraising "the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights" of freedom of speech and of the press, *Schneider* v. *State*, 308 U. S. 147, 161 (1939).

There is no evidence whatever in this record that the State courts even recognized the necessity of discharging that obligation. Their failure even to deal in opinions with the claim of constitutional protection at least suggests that they regarded the claim as trivial. Nor, apart from a series of assumptions upon assumptions which are implied in their decisions, have any reasons—substantial or otherwise—ever been advanced in support of the prohibition of this appellant's free enjoyment of its rights.

Contrasted with this lack of support for the judgment below are the conditions which this Court has said must be met before any interference with the freedom of the press will be tolerated.

> "The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state. Legislation which goes beyond this need vio-

BLEED THROUGH

POOR COPY

lates the principle of the Constitution." *Herndon* v. *Lowry*, 301 U. S. 242, 258 (1937).

And even a clear danger of substantive evil is not enough. Even when such a danger exists, it does not justify abridgment of the liberty of free discussion unless it arises under circumstances affording no opportunity to test the merits of the utterance by competition for acceptance in the market of public opinion. *Thornhill* v. *Alabama*, 310 U. S. 88, 104-105 (1940).

> "Moreover, the likelihood, however great, that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press. The evil itself must be 'substantial', Brandeis, J., concurring in *Whitney* v. *California*, *supra* [274 U. S. 357], 374; it must be 'serious', *id.* 376. And even the expression of 'legislative preferences or beliefs' cannot transform minor matters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression. *Schneider* v. *State*, 308 U. S. 147, 161.
>
> "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow." *Bridges* v. *California*, 314 U. S. 252, 262-263 (1941).

This Court has recognized that one of its gravest duties is to say where the individual's freedom ends and the State's power begins, *Thomas* v. *Collins*, 323 U. S. 516, 529 (1945). It was there said, in connection with the choice to be made between the individual's freedom and the State's power (at pp. 529-530):

> "Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. Cf. *Schneider* v. *State*, 308 U. S. 147; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Prince* v. *Massachusetts*, 321 U. S. 158. That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice. Compare *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152-153.
>
> "For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation."

And just as this Court is not bound by the legislative judgment which underlies the enactment of the statute in

POOR COPY

question, so it is not bound even by explicit findings of fact made by the State court. This is evident from the minute analysis of the facts made in *Pennekamp* v. *Florida*, 328 U. S. 331 (1946) and in *Craig* v. *Harney*, 331 U. S. 367 (1947). The priorities which have consistently been accorded to the great freedoms of the First Amendment led this Court, in the *Craig* case, to an independent examination of the facts and to a reversal of a specific affirmative finding by the trial court that the utterances there in question had in fact given rise to a clear and present danger to the administration of justice. Certainly any supposed implicit finding here, unsupported by the record and opposed by informed common knowledge of the habits of literate readers, cannot stand in the way of the performance by this Court of its duty to appraise for itself the supposed justifications for suppression.

Such an analysis of the facts was also made in *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940) and that case is closely in point. The offense of Cantwell was that he had committed a common law incitement to a breach of the peace. This Court recognized that such a conviction was "analagous to a conviction under a statute sweeping in a great variety of conduct under general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application". Referring to the "clear and present danger" rule, the Court reaffirmed that a State may not unduly suppress free communication of views under the guise of conserving desirable conditions. It therefore, in great detail, examined into the manner in which Cantwell was said to have committed a breach of the peace. It considered his deportment; it was neither noisy, truculent, overbearing nor offensive. It considered whether he intended to insult those for whom he

played a phonograph record on the public streets. It considered the question whether Cantwell's acts had disturbed others. All those questions it answered favorably to Cantwell.

The fact that Cantwell's hearers were actually highly offended did not prevent the Court from reversing the judgment of conviction. Earlier decisions to the effect that, regardless of intent, statements likely to provoke disturbance of good order are punishable, were distinguished upon the ground that in practically all of them the provocative language was held to amount to a breach of the peace because it consisted of "profane, indecent, or abusive remarks *directed to the person of the hearer*". (Italics added.)

The reversal was based upon the broad doctrine that "the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy". Therefore, "in the absence of a statute narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State", Cantwell's conduct was held not to justify conviction of the common law offense.

This consideration of the *Cantwell* case indicates the path which previous decisions show to be proper for analysis of the record here. Just as there was no showing in the *Cantwell* case that the petitioner's deportment was unseemly, there is no showing here that the book in question was offered to the public except as a serious work of literature and in a dignified manner. As in the *Cantwell* case, it is not here claimed that the appellant or the author of the book intended to insult or affront anybody. The fact that

BLEED THROUGH POOR COPY

a regular employee of the Society for the Suppression of Vice was stimulated to action against this book is of no greater consequence here than was the fact that a member of the Catholic faith was highly offended by the playing of Cantwell's phonograph record. There is in this book no language which can be construed as equivalent to an indecent remark directed to the person of the hearer.

Since there is no distinction between language of persuasion and language of fiction (*Winters* v. *New York, supra*), there can be no basis for distinction between the *Cantwell* case and the case at bar.

The application here of the rationale of the *Cantwell* case does not require a holding that all statutes dealing in general terms with the subject of obscenity are invalid on their face, any more than does the *Cantwell* case itself prohibit future prosecutions for the commission of a common law breach of the peace. Reversal in the case at bar would merely require that, in the future, courts charged with the duty of enforcing obscenity statutes should examine the work in question and the circumstances of its publication for the purpose of determining whether the motive of the artist, as gathered from the publication itself, was such as to lead to the reasonable conclusion that it was uttered for the purpose of subverting the morals of the community. Doubtless if there had been any evidence in the *Cantwell* record that he had been truculent or offensive, or that he had directed abusive remarks to the person of his hearers, the result in that case would have been different. Cf. *Chaplinsky* v. *New Hampshire,* 315 U. S. 568 (1942). So here, the distinction between this book and commercial pornography is easily drawn. There is no reason that serious literature should be shackled by suppression merely because the au-

thorities wish to stamp out the wholly unrelated commerce in bootlegged postcards or broadsides.

It is of course unnecessary to decide here the nature of every publication which would survive such a test. As in all fields of law, there will be areas in which there may be debate, as there can be none here, as to whether some future publication is or is not a bona fide work of literature. But the possibility of future dilemmas has never induced this Court to favor suppression in order to avoid them and of course, it will not here. The very "clear and present danger" rule itself breeds dilemmas but they are better than restraints. And if that rule is to have real meaning, it must be equally applied to all utterances concerning which it is charged that their publication constitutes a menace to society. Otherwise the growth in understanding which is an important goal of a free literature will be stunted because it will often be the target of those who favor directed thought over free development.

It is perhaps unnecessary to point out that the ancient vintage of obscenity statutes does not invest their construction and application with any immunity from scrutiny by this Court. The language of the *Bridges* case, *supra*, shows clearly that long acquiescence in violations of the Constitution, even by courts in protecting their own proceedings, will not be permitted to create a prescriptive right in suppression. With respect to the power of a State to punish out-of-court publications as contempts, it was there said (at pp. 267-268):

> "But state power in this field was not tested in this Court for more than a century. Not until 1925, with the decision in *Gitlow* v. *New York*, *supra*, 268 U. S. 652, did this Court recognize in the Fourteenth

POOR COPY

BLEED THROUGH

Amendment the application to the states of the same standards of freedom of expression as, under the First Amendment, are applicable to the federal government. And this is the first time since 1925 that we have been called upon to determine the constitutionality of a state's exercise of the contempt power in this kind of situation. Now that such a case is before us, we cannot allow the mere existence of other untested state decisions to destroy the historic constitutional meaning of freedom of speech and of the press."

So, here, it is not too late—nor, indeed, is it too early—for this Court to announce that there is nothing which excludes from the historic constitutional meaning of freedom of speech and of the press the right of a serious literary artist publicly to discuss the relations between the sexes to the extent he deems necessary for the development of his artistic conception.

c. Neither the history of the First Amendment, nor any other reason or authority, requires or would justify the Court in now holding that discussions of sex conduct constitute an exception to the "clear and present danger" rule.

Any assumption, heretofore sometimes casually indulged without particular examination, that the First Amendment, given its broadest possible scope, does not protect against prosecution for the publication of "obscene" utterances, proves upon analysis to be erroneous. Those who have made the assumption somehow seem to suppose that the literary presentation of sexual problems is in some sort of category by itself, and that therefore any description of sex conduct is removed from the constitutional pro-

tection of the freedom of the press. As sex is a rather common phenomenon, and interest in relations between the sexes is not unusual, this easy and unjustified assumption would deny protection to discussion of a significant part of human life. This case presents the opportunity to examine this question and to determine whether such an exception to the unequivocal language of the Amendment is justified.

Our research has revealed nothing in the history of the Bill of Rights which would support that exclusion. Madison, the leading spirit in its preparation, when he had occasion to describe the practice and sentiment leading to the guaranties of the freedom of the press in State constitutions, said:

> "Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the States, that it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits."[8]

---

[8]Report on the Virginia Resolutions, Madison's Works, Vol. 4, p. 544. See also Jefferson, Second Inaugural Address (1805) in Padover, *The Complete Jefferson*, 410, 413-414:

> "No inference is here intended, that the laws, provided by the State against false and defamatory publications, should not be enforced; he who has time, renders a service to public morals and public tranquility, in reforming these abuses by the salutary coercions of the law; but the experiment is noted, to prove that, since truth and reason have maintained their ground against false opinions in league with false facts, the press, confined to truth, needs no other legal restraint; the public judgment will correct false reasonings and opinions, on a full hearing of all

POOR COPY

BLEED THROUGH

Moreover, while it is true that some "abuses" of the press were well recognized at that time as subject to the sanction of the law, these specifically were abuses which in the law of libel were classified as private wrongs. Indeed, it was to this category of abuse, and only this, that Chancellor Kent addressed himself when he made the much quoted statement:

> "every citizen may freely speak, write, and publish his sentiments, on all subjects, being responsible for the abuse of that right; and that no law can rightfully be passed to restrain or abridge the freedom of speech or of the press".[7]

This view was forcefully put by Judge Tucker in his edition of Blackstone (1803):

> "Liberty of speech and of discussion in all speculative matters, consists in the absolute and uncontrollable right of speaking, writing, and publishing, our opinions concerning any subject, whether religious, philosophical, or political; and of inquiring

---

parties; and no other definite line can be drawn between the inestimable liberty of the press and its demoralizing licentiousness. If there be still improprieties which this rule would not restrain, its supplement must be sought in the censorship of public opinion."

Compare Jefferson's letter to N. Dufief, April 19, 1814, reprinted in full in the appendix to this brief, p. 37.

---

[7]2 *Kent's Commentaries* (1827) p. 14. This limitation of abuses of the press to private injuries had been continually reiterated by Jefferson, see the material reprinted in the appendix to this brief, p. 39. Story recognized the existence of this view, 3 *Story's Commentaries* (1833) pp. 738-739, but he did not commit himself on it, although he thought that the states could punish the "licentiousness" of the press if the national government could not. Nor did Story mention obscene publications as an abuse of the press, *ibid.*, pp. 739-743.

into and, examining the nature of truth, whether moral or metaphysical; the expediency or inexpediency of all public measures, with their tendency and probable effect; the conduct of public men, and generally every other subject, without restraint, except as to the injury of any other individual, in his person, property, or good name."[8]

That the framers of the First Amendment did not go beyond these principles is explained simply by the fact that they were never confronted with the problem raised by the public discussion of matters of sex in the terms in which we have since become acquainted with it. But, certainly, these principles as enunciated lend no support to the opinion that one isolated subject of literature was considered by the framers of the Bill of Rights to be in a category apart from all others.[9] To the people of those historic days the progress

---

[8]2 *Tucker's Blackstone* (1803) App. Note G, "Of the Right of Conscience; and of the Freedom of Speech and of the Press", at p. 11. St. George Tucker, a member of the Virginia Bar and a Professor of Law at William and Mary, was from 1803 to 1811 Judge of the Supreme Court of Appeals of Virginia and from 1813 to 1827 of the Federal District Court. See his biography by Armistead M. Dobie in the *Dictionary of American Biography*. A more extensive quotation from Judge Tucker's comment is reprinted in the appendix to this brief, p. 41.

[9]Obscenity was, as early as 1823, referred to specifically as one of the abuses of the press entitled to toleration under the principles of the First Amendment. This was by the Hon. Charles Jared Ingersoll in "The Influence of America on the Mind", the annual address to the American Philosophical Society (Philadelphia, 1823). Ingersoll (1782-1862) was a member of the Pennsylvania bar, a member of Congress 1812-14, serving as chairman of the House Judiciary Committee, from 1815 to 1829 a United States Attorney, and a member of Congress 1840-1849, serving as chairman of the House Committee on Foreign Affairs. See *Dictionary of American Biography*. An excerpt from his address is included in the appendix to this brief, p. 43.

POOR COPY

BLEED THROUGH

of the sciences of psychology, physiology and anthropology had not revealed the extensive complexities of sexual behavior which have become part of our literature today.

Of course, since the decision in *Bridges* v. *California, supra,*[10] it has become immaterial to consider the extent of the English common law and the limitations which the common law applied to the freedom of the press. Suffice it to say that the greater limitations placed by the pre-Revolutionary English courts on that freedom have not been incorporated into our Constitution. But, even in England, the law had not considered published obscenity separately from matters generally offensive to the moral order of the Established Religion.[11] And it is obvious that the English rules concerning blasphemy are inapplicable in this country under the First Amendment. Indeed, they were long ago impliedly rejected by the New York Court of Appeals when it was asked to apply the predecessor of Penal Law Section 1141(1) to a publication deemed offensive to religion.[12]

While the subsequent English development of a common law rule need not be dealt with here, it should be remembered that English law and particularly the leading case of *Regina* v. *Hicklin,* L. R. 3 Q. B. 360 (1868), have in the past been

---

[10]pp. 263-268.

[11]*The Queen* v. *Read,* Fort. 98, 11 Mod. 142 (Q. B. 1708); *Rex* v. *Curl,* 2 Str. 789, 1 Barn. 29 (K. B. 1727); *Rex* v. *Wilkes,* 4 Burr. 2527 (K. B. 1770); Alpert, *Judicial Censorship of Obscene Literature,* 52 Harv. Law Rev. 40, 44-47 (1938) on the *Wilkes* case and the contemporary characterization of his *Essay on Woman* as "blasphemous"; see also Nobbe, *The North Briton* (1939), pp. 235-264. Cf. Grant and Angoff, *Massachusetts and Censorship,* 10 B. U. Law Rev. 146 (1930).

[12]*People* v. *Eastman,* 188 N. Y. 478 (1907).

relied upon by both our state and federal courts for assistance in defining obscenity.[13]

The *Hicklin* case construed the statute 20 & 21 Victoria c. 83(1), "The Campbell Act", applying it to a publication entitled "The Confessional Unmasked." Counsel conceded this work to be obscene and sought to justify it by the defendant's bona fide purpose to expose abuses in the Catholic Church. The statute had been enacted because of the inadequacy of the remedies afforded at common law, and the debates upon it in Parliament and the speeches of its sponsor, Lord Campbell, show that it was not directed at bona fide literature.[14] Rather was it aimed at pornography: at books manufactured and sold "with the intention of corrupting the public morals."[15] The Queen's Bench was not dissuaded, however, from extending the reach of the statute, and announced in an opinion by Lord Justice Cockburn that the test should be (at p. 371): "whether the tendency of the matter charged as obscenity is to deprave or corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."

The wisdom of this particular interpretation of the prohibition of obscenity has been severely and authoritatively criticized, but in our courts the attack upon Cockburn's formula has occurred principally in the field of statu-

---

[13]See *People* v. *Muller*, 96 N. Y. 408 (1884); *United States* v. *Bennett*, Fed. Case No. 14,571, 24 Fed. Cas. 1093 (S. D. N. Y., 1879).

[14]146 Hansard, *Parliamentary Debates* (3rd series, 1857), 327-332, 865, 1152ff.

[15]op. cit. p. 865.

POOR COPY

BLEED THROUGH

tory interpretation, and State power in this field has never been tested.[16]

This Court, nevertheless, recently stated, *Winters* v. *New York, supra,* p. 510, that the best of literature, equally with the "seemingly valueless magazines" there involved is subject to control if lewd, indecent, obscene or profane, citing *Ex parte Jackson,* 96 U. S. 727, 736 (1877) and *Chaplinsky* v. *New Hampshire,* 315 U. S. 568 (1942).[17]

These cases, however, do not answer the constitutional question here. In *Ex parte Jackson,* this Court, refusing a writ of habeas corpus to a petitioner convicted of sending lottery advertisements through the mails, denied that the prohibition to the mails of such matter, or, for example, of obscene matter, involved any abridgment of the freedom of the press.[18] The reason given was that other channels of distribution remained open.

In *Chaplinsky* v. *New Hampshire,* the application of a statute, narrowly drawn to prohibit publicly spoken words likely to cause a breach of the peace, was upheld. This Court did no more than deny, as it had in *Cantwell* v. *Connecticut, supra,* that epithets are entitled to constitutional protection. The opinion points out (at p. 572) that the utterance of some words, such as the lewd, obscene, profane and libelous,

---

[16] *United States* v. *Kennerley,* 209 Fed. 119 (S. D. N. Y., 1913); *United States* v. *One Book Entitled Ulysses,* 72 F. (2d) 705 (CCA 2, 1934); *United States* v. *Levine,* 83 F. (2d) 156 (CCA 2, 1936); *Parmelee* v. *United States,* 113 F. (2d) 729 (App. D. C., 1940).

[17] A similar statement appears without citation of authority in *Near* v. *Minnesota,* 283 U. S. 697, 716 (1931).

[18] But see *Hannegan* v. *Esquire,* 327 U. S. 146 (1946). No authority was cited in the *Jackson* case as supporting this dictum and that case was, of course, decided long before the formulation of the "clear and present danger" rule.

"which by their very utterance inflict injury or tend to incite to an immediate breach of the peace," have never been thought to raise a constitutional question.[19] It would seem clear that the attention of this Court in the *Chaplinsky* case was directed to a use of conversational expletives devoid of context which has no parallel in the present case, involving a serious and lengthy work of literature which entails the imaginative communication of ideas on a variety of important problems of man's existence in society.

While this Court in the *Winters* case, having made the statement above referred to, later proceeded (at p. 520) to suggest that the statutory language here involved is not so vague as to prevent effective notice of the crime it punishes, it reserved the question of the sufficiency of that language for a time when it could be measured by the principles of the First Amendment. The Court noted (at p. 518) that the word obscene and its variants are apt because "well understood through long use in the criminal

---

[19]Professor Chafee, on whose authority this Court relied for these statements, has since elaborated his views, 1 Chafee, *Government and Mass Communications* (1947) 59-60, 200-215. Professor Chafee (at pp. 212-213) warns of undue apprehension sometimes exhibited by "middle-aged judges and legislators" concerning books on sex. At another point in his work (pp. 59-60), he recognizes the constitutional issues inherent in obscenity cases involving bona fide literature, but would adapt the clear and *present* danger test so that the test would become "clear and *probable* danger." "Then," says Professor Chafee, "we would argue to a censor who wanted to ban a really good novel or play which, like *Measure for Measure* and the Book of Genesis, contains a few disturbing thoughts or words: 'Very likely, as you say, it would be very damaging to society if these passages were translated into illegal acts by many persons, but is it really likely that this will happen? Isn't the risk small enough to be worth running for the sake of giving the public the benefit of all the good material that the author has put into his work.' "

BLEED THROUGH POOR COPY

law." Nonetheless, as the Court of Appeals of New York said in its opinion in that case, *People* v. *Winters*, 294 N. Y. 545, 550 (1945): "Indecency and obscenity are not and never have been technical terms of the law and hence we are without any full or rigorous definition of the uses made thereof in the administration of justice."

The result then, is that non-rigorous definitions of the terms—even though perhaps well understood in some jurisdictions but certainly not well understood in New York—coupled with reluctance to appreciate the office of literature as an indispensable and honored agent for the communication of ideas,[20] has led to the indulgence of crippling limitations on the freedom of author and publisher lest, in the treatment of sex behavior, they utter an "expression beyond the conventions of the day."[21]

Non-rigorous definition of the term "obscene" has, however, been subject to telling criticism, most particularly perhaps in England, where the famous test of *Regina* v. *Hicklin*, *supra*, led to almost immediate challenge. Having stated the law as it was in his well-known *Digest of the Criminal*

---

[20]This problem has been stated and analyzed by Professor John Dewey in the last chapter of his *Art as Experience* (1934), an excerpt from which is printed in the appendix to this brief, p. 46.

[21]Mr. Justice Frankfurter, concurring, in *Hannegan* v. *Esquire*, 327 U. S. 146, 159, 160. Chief Judge Learned Hand years ago in *United States* v. *Kennerley*, 209 Fed. 119 (S. D. N. Y., 1913), formulated what has recently been termed "perhaps the most useful definition of obscene," *Parmelee* v. *United States*, 113 F. (2d) 729 (App. D. C., 1940). The premise of this formulation, although it was evolved in a case in which the constitutional point was neither raised nor considered, challenged the breadth of the *Hicklin* rule, *supra*, upon the ground that society was not "prepared to accept for its own limitations those which may perhaps be necessary to the weakest of its members."

Law, Sir James Fitzjames Stephen, went on to state what he thought it should be:

> "A person is justified in exhibiting disgusting objects, or publishing obscene books, papers, writings, prints, pictures, drawings, or other representations, if their exhibition or publication is for the public good, as being necessary or advantageous to religion or morality, to the administration of justice, the pursuit of science, literature, or art, or other objects of general interest; but the justification ceases if the publication is made in such a manner, to such an extent, or under such circumstances, as to exceed what the public good requires in regard to the particular matter published."[22]

Stephens' statement is not without parallel in the statements of distinguished literary scholars and artists who, while not venturing constitutional or legal analysis, have contended that the maximum restraint on letters should go no further than to outlaw commercial pornography. Criticism of the crippling effect on literature of laws which set the conception of obscenity virtually at large, so that it can be applied to harmonize literature with particular judicial taste, has been effectively made by many writers who have not themselves sought to use the full freedom of discussion which they believe essential to a vigorous and free literature.[23]

---

[22]Stephen, *Digest of the Criminal Law* (1877) 105. That this view is highly regarded in England appears from the fact that it was recently included in a charge to a jury in an obscenity case, *Rex* v. *DeMontalk*, 23 Crim. App. Rep. 182 (1932).

[23]In the appendix to this brief are reprinted excerpts from comments by the noted novelists and critics Virginia Woolf and E. M. Forster, and by the distinguished American literary scholar

POOR COPY

BLEED THROUGH

Not only, however, is freedom in the treatment of sex behavior, or any other important factor in human life, essential to the advancement of the literary arts, and not only is freedom in the treatment of any subject squarely within the unequivocal command of the First Amendment, but, also, neither reason nor authority suggests that the broad command can be considered to be inapplicable to any particular subject of interest or comment.

d. The statute here has been neither narrowly drawn nor narrowly construed to punish specific conduct.

The foregoing portions of this brief have been devoted to a showing that the First Amendment may not be read as excluding from its protection utterances on any single subject. Leaving aside the occasional unsupported dicta, it has never been held by this Court that different constitutional standards are to be applied to discussions of sex than have been uniformly applied to discussions of other subjects.

We have also advanced the suggestion that reversal here would not require a holding that the statute in question is invalid on its face. It is therefore appropriate to consider whether the statute has been so narrowly construed and applied as to measure up to the stringent standards fixed by this Court in the development of the "clear and present danger" rule.

Clearly, the statute upon its face is not narrowly drawn. In the broadest possible terms it simply denounces written

---

William Allan Neilson. For a discussion of the problem from a more philosophical viewpoint, see also Professor F. H. Bradley of Oxford, *On the Treatment of Sexual Detail in Literature*, 2 *Collected Essays* (1935), 619.

obscenity. Since the courts below wrote no opinion in this case, we must look to other expressions of the New York State courts to determine just what definitions and boundaries are to be read into the statute. Interpretations by the State courts put the words of those courts into the statute as definitely as if it had been so amended by the legislature. *Winters* v. *New York*, 333 U. S. 507, 514.

It may be said at the outset that such expressions of the State courts, taken either singly or as a whole, lead to three conclusions. First, that the case law of New York does not narrow the broad words of the statute in any appreciable degree, and therefore the statute as construed in other cases does not meet the constitutional standard fixed by this Court.

Second, a reading of a number of the opinions of the State courts leaves the definition of the statute in a state of such confusion as to give rise to doubt that any definition can be confidently relied upon. While some expressions would lead one to believe that the statute is designed to protect only the young and immature, others speak broadly of the corruption of the morals of the entire public. While some place emphasis on the lack of literary merit, others suggest that literary merit is entirely immaterial. Although exceptions in favor of scientific and of literary works have been suggested, they have been so inconsistently applied as to make the exceptions almost valueless.

Third, "The crucial question is not the formal interpretation of the statute" by the State courts "but the application given it." *Herndon* v. *Lowry*, 301 U. S. 242, 260. In its application here, the offense made criminal is that of publishing and selling a bona fide work of literature which in a few passages contains explicit descriptions

POOR COPY

BLEED THROUGH

of sexual acts. In our view such a construction and application is invalid.

Turning now to specific decisions of the State courts, we find among the earliest *People* v. *Muller,* 96 N. Y. 408 (1884), which involved an indictment for the sale of obscene photographs. The court there said (at pp. 410-411):

> "It is to be observed that the statute does not undertake to define obscene or indecent pictures or publications. But the words used in the statute are themselves descriptive. They are words in common use, and every person of ordinary intelligence understands their meaning, and readily and in most cases accurately applies them to any object or thing brought to his attention which involves a judgment as to the quality indicated. * * * It is evident that mere nudity in painting or sculpture is not obscenity. Some of the great works in painting and sculpture as all know represent nude human forms. It is a false delicacy and mere prudery which would condemn and banish from sight all such objects as obscene, simply on account of their nudity. If the test of obscenity or indecency in a picture or statue is its capability of suggesting impure thoughts, then indeed all such representations might be considered as indecent or obscene. The presence of a woman of the purest character and of the most modest behavior and bearing may suggest to a prurient imagination images of lust, and excite impure desires, and so may a picture or statue not in fact indecent or obscene.
>
> "The test of an obscene book was stated in *Regina* v. *Hicklin* (L. R., 3 Q. B. 369), to be, whether the tendency of the matter charged as obscenity is to deprave or corrupt those whose minds are open to such immoral influences, and who might come into

> contact with it. We think it would also be a proper test of obscenity in a painting or statue, whether the motive of the painting or statue, so to speak, as indicated by it, is pure or impure, whether it is naturally calculated to excite in a spectator impure imaginations, and whether the other incidents and qualities, however attractive, were merely accessory to this as the primary or main purposes of the representation."

and (at p. 413):

> "We do not doubt that whether a publication is obscene or not may in some cases depend on circumstances. For example, a medical book for the instruction of medical men may contain illustrations suitable and proper as a part of the work, but which, if detached, and published only for circulation, might be deemed indecent within the statute."

It is difficult to determine from the *Muller* opinion whether the rule in *Regina* v. *Hicklin* was intended to be applied in New York. The *Hicklin* case had set up the standard of tendency to corrupt and had expressly rejected any consideration of the motive of the author. The *Muller* case, while citing the *Hicklin* case with apparent approval, placed emphasis on motive and suggested that tendency to corrupt might be immaterial under certain circumstances.

In the subsequent case of *People* v. *Eastman*, 188 N. Y. 478 (1907), the court, however, seems to have relapsed. It made no reference to the *Muller* case, and Chief Judge Cullen, concurring, said (at p. 480): "From the context of the statute it is apparent that it is directed against lewd, lascivious and salacious or obscene publications, the tendency of which is to excite lustful and lecherous desire."

POOR COPY

BLEED THROUGH

And (at p. 481): "The truth or falsity of the writing has no bearing on the guilt or innocence of the defendant under this section of the Code."

But the *Eastman* case was, after all, really a prosecution for blasphemy, and the words of the Chief Judge may perhaps be regarded as dicta, although, in fact, they bore directly upon the issue then before the court. Be that as it may, the Chief Judge's words were quoted in *People* v. *Brainard*, 192 App. Div. 816 (1920), when a conviction for publication of an autobiography of a prostitute was reversed because the book contained not "a single word or picture which tends to excite lustful or lecherous desire." It should also be noted that the reversal of the conviction there took place in spite of the fact that the court found that the book taught no "moral lesson."

The next decision deserving mention is *Halsey* v. *New York Society*, 234 N. Y. 1 (1922), from which it first appeared that literature—like medical works—was entitled to special protection. It was there held in a civil action for malicious prosecution that the book "Mademoiselle de Maupin," by Theophile Gautier gave no probable cause for its prosecution as an obscene book. A magistrate had dismissed a complaint against Halsey, who had been charged with selling the book, and a jury had held the Society for the Suppression of Vice liable in damages for having prosecuted him.

The Court of Appeals held the book not obscene in spite of the fact that it contained many paragraphs which, taken by themselves, were "undoubtedly vulgar and indecent." The record of the trial reveals not only that the book contained bedroom scenes considered by the trial court to be "lecherous", but also that it was most forcefully argued that

the book counselled vice, including a statement by the narrator of the story that: "Adultery appears to me the most innocent thing in the world. I deem it quite a simple matter that a young girl should prostitute herself" (*Halsey* Record on Appeal, fols. 113-128). To this, the Court of Appeals said (at p. 4):

> "No work may be judged from a selection of such paragraphs alone. Printed by themselves they might, as a matter of law, come within the prohibition of the statute. So might a similar selection from Aristophanes or Chaucer or Boccaccio or even from the Bible. The book, however, must be considered broadly as a whole. So considered, critical opinion is divided."

The court then went on to take judicial notice of and to consider critical opinion concerning the work and its author. The fact that critical opinion was not unanimous and that some referred to the book as "pornographic and dull," did not prevent the court from holding that the book did not run afoul of the statute.

The next case in chronological order was *People* v. *Pesky*, 230 App. Div. 200; aff'd. 254 N. Y. 373 (1930). That was a prosecution against the unlawful possession of "Hands Around", which was a book avowedly "intended for private circulation only" and presented as a group of "studies in the etiquette of the liaison and all its nuances." The book professed to deal with the "exquisite handling of the licentious" and boasted that "All stratagems of sex are uncovered." The Appellate Division, in affirming a conviction, noted that there had been no claim that the book was of any value as a literary production or as an intellectual treat. "There was no attempt to point to any lesson that might be

POOR COPY

BLEED THROUGH

of value to anyone who would read it. It was just a clear attempt to portray filthy ideas, for the book is without a single redeeming feature." In the *Pesky* case, we see the courts examining into the literary merit of the book and the lesson taught. But when the case reached the Court of Appeals, it affirmed simply upon the ground that it was not a trier of the facts and that the lower courts might have reasonably concluded that the book was obscene beyond a reasonable doubt. It held that the book was not "so innocuous as to forbid the submission of its quality to the triers of the facts."

Still later, under an analogous statute, the Court of Appeals did not feel bound by a lower court finding of obscenity when it reversed the convictions in *People* v. *Wendling,* 258 N. Y. 451 (1932). There the prosecution was directed at the staging of the play "Frankie and Johnnie". Although the court thought the language of the play was coarse, vulgar and profane and the plot cheap and tawdry, and that the play tended to degrade the stage and was indecent from the point of view of propriety, the court refused to act as a censor or to regulate manners, saying (at p. 453): "One may call a spade a spade without offending decency, although modesty may be shocked thereby. (*People* v. *Muller,* 96 N. Y. 408, 411.)" In answer to the argument that the play tended to corrupt the morals of youth, the court said: "Here again the question is not whether it would tend to coarsen or vulgarize the youth who might witness it but whether it would tend to lower their standards of right and wrong, specifically as to the sexual relation." And further: "The play may be gross and its characters wanting in moral sense. It may depict women who carry on a vicious trade and their male associates. It cannot be said to suggest, except 'to a prurient imag-

ination,' unchaste or lustful ideas. It does not counsel or invite to vice or voluptuousness. It does not deride virtue."

Since "Mademoiselle de Maupin" contained language counselling vice and deriding virtue, one might have thought that the test of tendency to corrupt had at last been abandoned. The *Wendling* case, however, marked a retrogression in tolerance when it endorsed a test of obscenity, including tendency to lower standards of right and wrong, inviting to vice or voluptuousness and deriding virtue. The *Wendling* case is, however, significant because of the fact that the Court of Appeals did not feel bound to affirm a conviction by the Court of Special Sessions simply because the latter was the trier of the facts.

The lower State courts appear to have continued the progress toward greater tolerance of bona fide literature. It should be noted that these lower court decisions were not appealable since they dismissed criminal proceedings, and therefore they are decisions of the highest courts which had the authority to pass upon the question. Thus, in *People* v. *Viking Press, Inc.*, 147 Misc. 813 (1933), a City Magistrate refused to issue a complaint against "God's Little Acre" by Erskine Caldwell. The Magistrate acted upon the authority of the *Muller, Halsey* and *Wendling* cases, saying that (at p. 814): "The statute is aimed at pornography, and a pornographic book must be taken to be one where all other incidents and qualities are mere accessories to the primary purpose of stimulating immoral thoughts. The courts have strictly limited the applicability of the statute to works of pornography and they have consistently declined to apply it to books of genuine literary value. If the statute were construed more broadly than in the manner just indicated, its effect would be to prevent altogether the realistic

POOR COPY

BLEED THROUGH

portrayal in literature of a large and important field of life. The Court of Appeals has consistently frowned upon such an interpretation of the statute." In reaching its decision, the court took cognizance of literary reviews and of the fact that the book contained internal evidence that it was written with a sincere attempt to present with truth and honesty a segment of life in a part of the United States.

Similarly, in *People* v. *Miller,* 155 Misc. 446 (1935), a City Magistrate held the book "November", by Gustave Flaubert, to be not obscene. In dismissing the complaint, the court said (at pp. 447-448): "The obscenity statute was not intended to suppress *bona fide* literary effort but rather to prohibit the exploitation of smut—dirt in the raw (*People* v. *Wendling,* 258 N. Y. 451, at p. 453; *United States* v. *One Book Called 'Ulysses,'* 5 Fed. Supp. 182, 183; affd., 72 F. [2d] 705.)"

Shortly before the decision in the *Miller* case, the Appellate Division had passed on an unidentified book and had held it to be obscene, *People* v. *Berg,* 241 App. Div. 543 (1934); affd. 269 N. Y. 514 (1935). There the test again was whether the book had literary merit, whether it taught a lesson or pointed a moral, and whether it told a story concerning any actual characters or era. Since, in the court's judgment, the book failed to pass any of these tests, it was held obscene. As late as 1934, we find the Appellate Division saying (at p. 544):

> "Chiefly, judicial opinions in such cases have dealt at length with books determined not to be obscene, with no clear standard given for determining obscenity and indecency. But from those opinions where a clean certificate of character has been given to questioned books there does emerge, somewhat hazily, the rule that an obscene book is one that 'tends

> to corrupt the morals of youth,' or 'to lower the standards of right and wrong specifically as to the sexual relation.' To be deemed obscene it must show 'sexual impurity' and result in 'the exciting of lustful and lecherous thoughts and desires' or tend 'to stir sex impulses or to lead to sexually impure thoughts.' The application of these standards in any particular case must in large measure depend upon the enlightened and discriminating reaction of the judicial mind."

The affirmance of the Court of Appeals was without opinion.

Almost simultaneously, the Appellate Division of another Judicial Department was deciding *People* v. *Fellerman*, 243 App. Div. 64 (1934); affd. 269 N. Y. 629 (1936). There the court held a magazine to be obscene because it contained indecent and obscene pictures of persons in nudist camps and colonies engaged in nudist activities. Answering the argument that the magazine was sincerely fostering the nudist movement by means of educational text and photographs, the Court there said (at p. 65):

> "What the real intent of the publisher may be we cannot say. We know from the record in this case that the magazine was placed on sale to the general public where it could have been purchased by the young as well as the old, and a charge of twenty-five cents was made for it. We are naturally constrained, therefore, to adopt the view that there was a mercenary motive underlying its publication and sale. * * * We would say of it, that it tends 'to lower the standards of right and wrong,' that it offends against modesty, and that it is subversive of morality."

Here, again, the affirmance of the Court of Appeals was without opinion.

POOR COPY

BLEED THROUGH

Also contemporaneous with the decisions just discussed was the decision in *United States* v. *One Book Entitled Ulysses*, 72 F. (2d) 705 (1934), in which Judge Augustus N. Hand rejected the test of tendency to promote lustful thoughts and suggested that "the same immunity should apply to literature as to science, where the presentation, when viewed objectively, is sincere, and the erotic matter is not introduced to promote lust and does not furnish the dominant note of the publication. The question in each case is whether a publication taken as a whole has a libidinous effect. The book before us has such portentous length, is written with such evident truthfulness in its depiction of certain types of humanity, and is so little erotic in its result, that it does not fall within the forbidden clause" (at p. 707).

And Judge Hand continues (at p. 708):

> "In applying this test, relevancy of the objectionable parts to the theme, the established reputation of the work in the estimation of approved critics, if the book is modern, and the verdict of the past, if it is ancient, are persuasive pieces of evidence; for works of art are not likely to sustain a high position with no better warrant for their existence than their obscene content."

We mention the *Ulysses* case here because Judge Hand's opinion bears evidence of his belief that his decision was in accord with New York law. It will be recalled that in 1934, in the *Berg* case, the Appellate Division was still applying the "hazy" *Hicklin* doctrine, i. e., that a book is obscene which "tends to corrupt the morals of youth" and was testing the book by the reaction of the enlightened judicial mind. And the Court of Appeals had affirmed the decision in the *Berg* case without opinion. But other respectable authority was at the same time reading the *Halsey* case as having

definitely overruled the *Hicklin* doctrine, *United States* v. *Levine*, 83 F. (2d) 156 (1936). In that case, Chief Judge Learned Hand interpreted the *Ulysses* case as having followed the *Halsey* case, which in turn, according to Chief Judge Hand, had overruled the *Hicklin* doctrine.

Justice Perlman, who dissented from the decision of the trial court in the case at bar, had been a City Magistrate in 1936 and as such had had occasion to pass upon André Gide's autobiography, *People* v. *Gotham Book Mart, Inc.*, 158 Misc. 240 (1936). In spite of the many words which had then already been written concerning the meaning of the word "obscene" under the New York statutes, Justice Perlman could find no clear and unmistakable test to be applied. However, after reviewing the *Muller, Halsey, Viking Press, Berg* and *Ulysses* cases, he framed the following test (at p. 244):

> "Whether or not, recognizing the latitude afforded all works of literature and of art, and that tastes may differ, a reasonable, cautious and prudent man environed with the conditions of life as they exist today, and not in some past age, would be justified in believing that the book was obscene and lewd not in certain passages, but in its main purpose and construction and published for no useful purpose, but simply from a desire to cater to the lowest and most sensual part of human nature?"

The cases already reviewed and several others led one commentator (Alpert: *Judicial Censorship of Obscene Literature*, 52 Harv. L. Rev. 40, 64) to say, in 1938, that "the New York law is a very welter of dissonances". Mr. Alpert summarized the rule as "the orthodox test for obscenity: whether the tendency of the matter charged is to deprave and corrupt those whose minds are open to such

POOR COPY

BLEED THROUGH

immoral influences and into whose hands the matter might fall. To this, however, are added four apparently subsidiary tests: whether the book lacks literary merit; whether it teaches a lesson or moral; whether it describes a period of history and the people and customs of that time; whether the story is true or representative of any individual or class."[24]

In any event, there is now grave doubt as to whether Chief Judge Learned Hand, Justice Perlman, Mr. Alpert or anyone else has succeeded in correctly reading the law of New York. For, in 1945, the Court of Appeals, in *People* v. *Winters*, 294 N. Y. 545, framed a test even more elusive and difficult, if not impossible, to apply (at p. 551):

> "In the nature of things there can be no more precise test of written indecency or obscenity than the continuing and changeable experience of the community as to what types of books are likely to bring about the corruption of public morals or other analogous injury to the public order. Consequently, a question as to whether a particular publication is indecent or obscene in that sense is a question of the times which must be determined as a matter of fact unless the appearances are thought to be necessarily harmless from the standpoint of public order or morality."

This appears to be the first time that the test has been framed in terms of the likelihood of bringing about the corruption of the morals of all the public, and in terms of whether "appearances are thought to be necessarily harmless." Entirely apart from any question of the confusion which exists with respect to the rule, it now seems that the New York courts look to the "tendency" or to the "likelihood" of injury. And such tests are the very ones which

[24]But see *People* v. *Eastman*, 188 N. Y. 478, 481, *supra*.

COPY BOUND CLOSE IN CENTER

this Court has repeatedly rejected in First Amendment cases. Under "a law general in its description of the mischief to be remedied and equally general in respect of the intent of the actor," the standard of guilt may not be made the "dangerous tendency" of his words. *Herndon* v. *Lowry*, 301 U. S. 242, 258. Whether the Constitution protects the right to publish, must, under the cases, depend not upon remote tendency or likelihood, but upon clear, serious, imminent danger. And no such danger from the publication now before the Court has ever been claimed or established.

Only those with little faith in the sturdiness of public taste or the moral fibre of literate readers could find the slightest danger in such a book. There is no basis whatever for assuming that the book would find wide circulation among the young, who are not notable for avid interest in fiction written by distinguished literary critics. But only a very low opinion of the good sense of the young would give rise to any fear that this book would stimulate to immorality. Such imaginary dangers, conjured up by excessive timidity, are not the sort which justify denial of constitutional protection. Literature is not to be shackled because some few individuals may perhaps demean their literacy.

Throughout the instant litigation, as it proceeded through the State courts, the appellant urged that under the decisions of the appellate State courts no bona fide work of literature had ever been held to violate section 1141(1). The State, on the other hand, has consistently urged that the test is the test of the *Hicklin* case, i.e., whether the tendency of the matter charged as obscenity is to deprave or corrupt those whose minds are open to such immoral influences and who might come in contact with it. The dissenting justice in the trial court was still of the opinion, as he had been in 1936, that, generally speaking, the *Ulysses*

POOR COPY
BLEED THROUGH

rule was the one to be applied (R. 47-48), but, in spite of the unsettled state of the law, the New York courts wrote no opinions and therefore shed no light as to the test which was applied to the book now being considered.

In this respect, the case is like *Thornhill* v. *Alabama*, 310 U. S. 88 (1940), in which the finding against the petitioner was a general one and did not specify the testimony upon which it rested. There, as here, the charges were framed in the words of the statute and had to be given a construction which had been put upon the statute by prior State decisions. Here the prior State decisions have given no evidence of any recognition that the "clear and present danger" rule was the one to be applied. Thus, as in the *Thornhill* case, there is no evidence that the statute aims specifically at evils within the allowable area of State control. Nor, indeed, are the evils themselves sufficiently defined or identified. "The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview" (310 U. S., at pp. 97-98).

If the abuses created by loud-speakers can be controlled by narrowly drawn statutes, *Saia* v. *New York*, 334 U. S. 558, 562 (1948), so can the evils in commercial pornography be likewise controlled. The *Thornhill* case makes it clear that there is no burden on the appellant to demonstrate that the State could not constitutionally have written a different and specific statute covering its activities as disclosed by the charge and the evidence introduced against it. Its burden is simply to show that the statute construed and here applied, as it has been—in terms of tendency and of likelihood, in

COPY BOUND CLOSE IN CENTER

terms which measure its literary merit, in terms which test the truth of the contents of the publication—cannot survive an attack made upon the ground that, in this case, as so construed and applied, it violates the First Amendment. That is a burden which, we submit, the appellant has here sustained.

Conclusion

When the Court considers this book and the circumstances of its publication as a serious literary work, as it must, it will find, as it recently did in *Craig* v. *Harney*, 331 U. S. 367 (1947) and other cases, that no clear and present danger justifies the suppression which is involved in the conviction below. No genuine peril to the State justifies the conviction. The real peril to the State is in suppressing ideas and the right of free expression. The Constitution creates an atmosphere in which the arts can flourish, not one in which they are in constant danger of being stunted by the timid pruning of censors. The whole course of decisions under the First Amendment in recent years shows that the conviction below cannot be allowed to stand.

The judgment should be reversed.

Respectfully submitted,

WHITNEY NORTH SEYMOUR,
Counsel for appellant.

GEORGE G. GALLANTZ,
JAMES F. DWYER,
NEWELL G. ALFORD, JR.
of Counsel.

September 30, 1948.

POOR COPY
BLEED THROUGH

FILE COPY

Office - Supreme Court, U. S.
FILED
OCT 5 1948
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1948

No. 11

DOUBLEDAY & COMPANY, INC.,
Appellant,

vs.

THE PEOPLE OF THE STATE OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPENDIX TO APPELLANT'S BRIEF

BLEED THROUGH

POOR COPY

Index

PAGE

Collection of Literary Reviews of "Memoirs of Hecate County"

United States Quarterly Book List, September, 1946
Quotation from flyleaf 1
Literary review 2

New York Times, March 7, 1946 4
Reviewed by Charles Poore

New York Herald Tribune, March 10, 1946..... 7
Reviewed by Richard Match

Time, March 25, 1946..... 11

Saturday Review of Literature, March 23, 1946... 14
Reviewed by Harrison Smith

Knickerbocker Weekly, July 22, 1946..... 17
Reviewed by Dola DeJong

New Republic, March 25, 1946..... 22
Reviewed by Malcolm Cowley

Tomorrow, June, 1946..... 27
Reviewed by John Richmond

Partisan Review, Summer, 1946..... 29
Reviewed by Alfred Kazin

Jefferson's letter to N. Dufief..... 37

Excerpts from Jefferson's Works, Remarks on Freedom of the Press 39

Excerpt from Tucker's Appendix to Blackstone..... 41

Excerpt from Ingersoll's Address 43

Excerpt from Dewey, *Art as Experience*..... 46

Excerpt from Article by Virginia Woolf..... 49

Excerpts from Articles by Forster 51

Excerpt from Article by Neilson 53

BLEED THROUGH

POOR COPY

THE UNITED STATES QUARTERLY BOOK LIST

Vol. 2, No. 3, September, 1946

[The nature and origin of the United States Quarterly Book List is described in the following excerpt from page iii of the September, 1946 issue]

The *United States Quarterly Book List* has its origin in a recommendation of the Inter-American Conference for the Maintenance of Peace, held in Buenos Aires in 1936. The substance of this recommendation is that each American republic issue a quarterly bulletin, giving notice of recently published books of a scientific, historical, literary, or artistic nature, to be distributed and exchanged among the republics by suitable government agencies.

A book is here defined as a bound volume of one hundred or more pages. Exceptions as to minimum length may be made, especially for volumes of poetry and for concise tools of reference and research. Only books published originally in the United States and available for general distribution are eligible for inclusion. Since the purpose of the *Book List* is to make known the current literary, learned, and scientific contributions of the United States, certain classes of books are more or less automatically excluded. These classes are: light fiction, juveniles, work and craftbooks and manuals, textbooks, translations, reprints, and periodicals as distinguished from serials. Provision is made, however, that individual items of outstanding merit in these classes may be considered for inclusion on the basis of their contribution to art, literature, the sciences, or technology.

The information concerning each book listed includes a main entry, an annotation primarily descriptive of the contents of the book, and, where information is available, a biographical sketch of the author, intended to place him in relation to his field and to the particular book listed. The

form of entry is adapted from the Library of Congress catalog card, giving author and title, imprint, collation, price, and Library of Congress card number.

The *Book List* is issued in March, June, September, and December. The March issue, which is Number 1 of the volume, lists books published during the quarter ending December 31 of the preceding year; the three succeeding numbers of the volume list books published during the three succeeding quarters. Books received after the close of the quarter to be covered by any number of the *Book List* will be considered for inclusion in the following one.

Contributors to each issue of the *Book List* are listed by name and occupation or institutional affiliation, but because the Library of Congress assumes full responsibility for all material appearing in the *Book List*, the annotations are unsigned.

The *Book List* is broad in scope, is highly selective, and conversely is neither comprehensive nor exhaustive. It is intended to be useful to persons wishing to keep abreast of current contributions of the United States in the fields of the fine arts, literature, philosophy and religion, biography, the social sciences, the biological sciences, the physical sciences, technology, and reference.

[The following is from pages 183-184 of the September, 1946 issue under the heading "Literature", sub-heading "Novels and Tales."]

Wilson, Edmund. Memoirs of Hecate County. Garden City, N. Y., Doubleday. 338 p. 20 cm. $2.50. 46-2116.

Described on the dust jacket as "fiction," these loosely related chronicles bear internal evidence that they are to some extent reflective and critical autobiography. All have in common characters summering in Hecate County, an imagined well-to-do suburban colony near New York.

Although all the pieces have the style of the polished and subtle raconteur, the tone and subject matter vary from social reporting to fantasy. Consequently, the reader

POOR COPY

BLEED THROUGH

may at times find himself speculating upon the sources of Mr. Wilson's data instead of devoting himself to the book as a work of art. Three of the stories have been published before. Of these, The Man Who Shot Snapping Turtles tells of a sinister esthete who descends from campaigning to protect ducks as object of beauty to exploiting their natural enemies, snapping turtles, for financial gain. In Ellen Terhune, the character of a woman composer is discovered and accounted for through the fantasy of visits into her family past.

Of the new sketches, The Princess with the Golden Hair fulfills best the statement of the jacket—"the adventures of an egotist among the bedeviled." Essentially, this is a story of seduction, disappointment, and failure, upon the part of the egotist, to face up to any reality when his ideals collapse. The contrast between Imogen, the princess, and Anna, the proletarian, is perhaps too doggedly pursued; the seduction scenes are purposely almost clinical in their physical detail. The total effect of the story, however, derives from the self and social analysis, more courageous than smug.

The Milhollands and Their Damned Soul is a knowing satire on the industrialization of publishing, and its ramifications in book selection clubs, book reviewing, and advertising. As a whole, the MEMOIRS satirize a relatively small but influential group who consider themselves an intellectual and cultural elite.

Wilson, Edmund. Born 1895. Educated at Princeton University, A. B., 1916. Member of staff, *The New Yorker*. Publications: I Thought of Daisy, 1929; Axel's Castle; a study in the imaginative literature of 1870-1930, 1931; To the Finland Station; a study in the writing and acting of history, 1940; and other works.

COPY BOUND CLOSE IN CENTER

THE NEW YORK TIMES

March 7, 1946

BOOKS OF THE TIMES

BY CHARLES POORE

"Memoirs of Hecate County,"* by Edmund Wilson, the most perceptive and informed and implacable of contemporary American critics, is a tortured and tortuous book. It is a pastiche of fragments that might have been a novel if the symbolic and the realistic passages had ever met. Instead, it is a disjointed sequence of murky, suburban-Gothic tales about members of one wing of the Scott Fitzgerald generation growing more frustrated and more bedeviled and more garrulous about their woes and the state of the world, and they head for the last crack-up and time goes hopelessly on.

The clarity and force of Mr. Wilson's criticism seem to vaporize when he starts to tell a story. In place of narrative we get essays—sometimes very fine essays—and case histories—sometimes rather clinical case histories, as in the tasteless love scenes—and allegories, but disappointingly little life. The hero of this story, a middle-aged writer on art and economics, is a priggish amorist and blood brother to T. S. Eliot's J. Alfred Prufrock. His three loves are more at ease in their parts as charades of the proletariat, the bourgeoisie and the heedless leisure class than as human beings. It is obvious that Mr. Wilson has spent infinite pains in trying to make them real. But how can they be real when they have to spend so much time symbolizing things?

It is hard to understand why Mr. Wilson the critic allows Mr. Wilson the story-teller to clutter up his tales with so much irrelevant or disparate material. It may be just

*Memoirs of Hecate County. By Edmund Wilson. 338 pages. Doubleday, Doran. $2.50.

POOR COPY

BLEED THROUGH

for the fun of it; just for the pleasure of talking about left-wing movements, advertising, publishing, and so on; just for the interest he has found in drawing-room sleight-of-hand and library research in magic. Or it may be because he is fundamentally a moralist, first, last and all the time, even when he is writing scenes decidedly not meant for children, relentlessly bent on searching everywhere for what is wrong with human beings and their world.

At any rate, in "Memoirs of Hecate County" he alternately belts his burdened characters with supernatural diabolism and economic materialism. This is a novel mixture. Under the treatment the characters generally emerge bloody or somewhat bowed, when they emerge at all. Some are killed off, some are preserved for special, earthly limbos. If Marx doesn't get them, the devil will.

The devil has a field day in suburbia. The main scene of the story (when it is not Manhattan Island) is in the countryside somewhere on the commuters' cocktail circuit near New York. Outwardly it is realistic down to the last croquet set. But it is also obviously named for Hecate, that three-headed goddess of black magic, nightmares and the underworld of whom Macbeth spoke feelingly when—after inquiring whether it was a dagger that he saw before him—he went on to remark that:

> *Now o'er the one-half world*
> *Nature seems dead, and wicked dreams abuse*
> *The curtain'd sleep; now witchcraft celebrates*
> *Pale Hecate's offerings . . .*

The first three tales in Mr. Wilson's undertaker's garland for the less beautiful than damned (they first appeared in The Atlantic Monthly, Partisan Review, and Town and Country) set the mood by stages. "The Man Who Shot Snapping Turtles" is more entertaining as an illustration of rugged enterprise (he built up quite a business of canning them) than of more mysterious matters. "Ellen Terhune" presents a Jamesian venture into the past, with added lec-

COPY BOUND CLOSE IN CENTER

tures on music, as we are led backward into her childhood and antecedents. "Glimpses of Wilbur Flick" belabors charlatanism in various contemporary forms.

All these are very elementary exercises compared to the last three stories, "The Princess With the Golden Hair," "The Milhollands and Their Damned Soul" and "Mr. and Mrs. Blackburn (also Malatesta, Chernokhvostov and Swarzkopv) at Home." These form the substance of the black-magic parables and contrasting loves and hates we have been discussing. They bulge with so much symbolism that, like Joyce's "Finnegans Wake" they need a key; like Eliot's "The Waste Land" they need explanatory notes. When a character wears a crescent moon in her hair or shows fangs you can see that good old Hecate and her people are about, but the devil turns up in so many guises that at least a pocket guide should be supplied. We wish the devil were as simple as he was when he first appeared to Amory Blaine in "This Side of Paradise."

By way of relief, there are familiar scenes that remind you of the plays S. N. Behrman used to write in the Nineteen Thirties, in which themes of rugged social significance used to be discussed against backgrounds of rather plush social decor. In the same way Mr. Wilson can do a standard-brand parody of the "lit'ry" life as easily as Tom Wolfe or Tess Slessinger.

It is when he starts collaborating with Proust, Joyce, Freud, Marx, Henry James, Scott Fitzgerald and the historians of the Greek and Roman mythologies, all at the same time, that we want to ask Edmund Wilson the critic to step in and straighten out Edmund Wilson the story-teller.

POOR COPY

BLEED THROUGH

NEW YORK HERALD TRIBUNE

March 10, 1946

Mr. Wilson's Six Ironic and Satirical Tales

Memoirs of Hecate County. By Edmund Wilson. 338 pp. New York: Doubleday and Company. $2.50.

Reviewed by Richard Match.

There are 3,100 counties in the United States, none of which is named Hecate. Hecate County and its inhabitants belong in the category whose resemblance to real places and persons is said to be entirely coincidental—but seldom is. They provide setting, atmosphere, and cast for the six longish stories that Edmund Wilson, book reviewer of "The New Yorker", has included in these "memoirs".

Hecate County is the rainbow land at the end of the Sawmill River (or Merritt) Parkway, dotted with the rococo week-end palaces of traction magnates and the Tudor-modern villas of New York advertising men. Its curious name, we are told, was merely one of those classical revivals, like Syracuse and Ithaca, which early Americans were so fond of—Hecate having been the Greek goddess of law courts, animal husbandry, the infernal regions, and divers other jurisdictions. The reader with a Britannica handy will know that the Romans called her Trivia and will suspect that Mr. Wilson's choice was no accident.

The author's protagonist, the "I" of all six stories, is one of Hecate County's lonely intellectuals; an ineffectual young man with an independent income who had called himself a Socialist at college and was now, in the years before and after 1929 writing a book on art and its social-economic roots. Around this formidably erudite person, the narrator of four stories and the leading character of two, there revolves a world of gay suburbanites drinking Prohibition cocktails to the way of life that would, fifteen years later, be so rudely disturbed by the United Nations Organization site-selection committee. In the Hecate cosmos of paunchy

Yale men and their chatelaines, he wandered restlessly, attending monumental summer soirees that recall the heyday of Jay Gatsby and F. Scott Fitzgerald, surrounded by "great quantities of tan-backed girls and scarlet-faced men, with highballs fizzing in their hands."

All these people considered Mr. Wilson's hero "brilliant", and enough of them unburdened to him the emotional woes of Hecate County living to make half a dozen ironic parables of our time. Asa M. Stryker was the first, in a story called "The Man Who Shot Snapping Turtles". Stryker was a former professor whose pet ducks were being decimated by hungry snapping turtles. The situation assumed a religious aspect for him: Good (the ducks) versus Evil (the snappers). Baffled, Stryker decided to exploit the evil he could not eradicate, began to breed turtles commercially, marketed "Snapper Consomme", made a fortune and in time came to grief—as must all men "who encourage the breeding of snapping turtles."

Less moral but equally ironic are "Glimpses of Wilbur Flick" and "The Milhollands and Their Damned Soul."

The former is a simple bit of ideological sarcasm, being the story of a wealthy misfit's efforts to find a place for himself in the social scheme. After vainly seeking solace in the Catholic Church, the native Fascist movement, alcohol, narcotics and psychoanalysis, Wilbur Flick found happiness in the Communist party. The party was, for him, "a kind of exclusive club which was soon to dominate the world."

Book-Reviewer Wilson's satirical talents, ordinarily suave, break loose into the realm of savage caricature when he starts to talk shop. His story of the literary brothers Milholland will produce some very red ears along Publishers' Row. Jim Milholland was the editor of "Booklover"; Warren headed the selection committee of the nation's biggest book club; Spike broadcast radio reviews of fat new novels, each week announcing the appearance of "the American Tolstoy" or "the American Jane Austen."

POOR COPY

BLEED THROUGH

The Milhollands, in short, derived upper-bracket incomes from "the simple commercial processing of words." Mr. Wilson's subversive inside view of the "book industry," the machinery that builds best sellers with Willow Run efficiency, is capable of rocking bookish circles in Hecate and adjoining counties more than anything since the death of William Lyon Phelps.

Less successful are two other stories in which, the narrator tells us, he has "carried so much of dreaming into real life . . . that I was not always quite sure which was which." The reader may be in the same boat. In one of these stories, Mr. Wilson has written a dozen pages of dialogue in uninterrupted French, for no reason that this startled reviewer could discern.

The major episode of the Hecate County memoirs is "The Princess With the Golden Hair," which occupies about half the book and might easily have been published as an independent novel. It concerns the narrator's dual amatory involvement with a blonde Hecate matron and a proletarian girl from Brooklyn. Imogen Loomis was the golden-haired princess, the beautiful but neurotic wife of an advertising man; though happily married, she liked to indulge in extracurricular romantic fantasies. In sharp contrast, there was little Anna Litvak, the Ukrainian dance-hall hostess, devoted, sensible, in whom "there had survived through so much that was degraded and harsh . . . a clear little power of perception . . . a realistic sense of the way things were that had never become embittered." . . .

"I saw," the narrator writes, "that the union of Imogen and Ralph was a striking dramatic symbol of the queer combination, under capitalism, of a disgraceful economic reality and a dissembling romantic screen. Ralph made the money in advertising"—hiring himself out to greedy industrialists—"and Imogen spent the money on domestic settings . . . that made it possible for her always to fancy . . . that they were living under quite different conditions. But the world of Anna was the real world, the base on which

COPY BOUND CLOSE IN CENTER

everything rested." . . . Though recognizing all this, our hero fails to marry Anna when she needs him most ("I wouldn't quite dare to bring her out to Hecate County") and sinks glumly back into his suburban shadow-world, doomed forever to a Limbo one hour from Grand Central.

For economic "symbols," Mr. Wilson's characters in this story exhibit unusual depth and development. Like the other stories, it is written with genuine style, and the author has thrown in a handsome tribute to Brooklyn and some of the most explicit love-making that has ever seen respectable print.

POOR COPY

BLEED THROUGH

TIME

March 25, 1946

BOOKS

Memoirs of Hecate County. Edmund Wilson. Doubleday ($2.50).

Critic Edmund Wilson's first book of fiction since *I Thought of Daisy* (1929) is the first event of the year which can be described as "literary." For it is more & more unusual for U. S. writers to try to produce literature which is serious without solemnity, entertaining without shallowness, intelligent without owlishness, socially observant without being dogmatically vindictive, morally acute without being mealymouthed.

Among the six stories in this book are a study of the dead hand of the past on a living person; a study of the Manichaean heresy (the notion that the Devil is as powerful as God and that they struggle for supremacy); the galloping putrefaction of American letters; the galloping putrefaction of moral and political values. Author Wilson has also chosen to write literally (and incidentally) about sexual intercourse. As a result, *Memoirs of Hecate* County* will probably be hailed as an event in gaminess.

Housebroken Suburbanites.

Wilson's chronicle of his mythical county is a series of portraits of the demi-suburbanites who live amphibiously between heavily housebroken country and a U. S. metropolis (New York City). Unlike pudgy Author Wilson, the nameless narrator is a tall, slim analyst of the influence of social and economic conditions on painting. His neighbors and their doings are also imaginary, despite unmistakable glints and graftings of a well-known U. S. critic, a well-

*Pronounced heck-it; the goddess of witchcraft.

COPY BOUND CLOSE IN CENTER

known radio commentator, an up & coming publishing house, a famed literary magazine and book club.

One neighbor, an ex-professor of chemistry, egged on by a boozily mischievous advertising man, acts out a cruel, funny little fable of Good & Evil when he banishes the ducks he loves and sublimates the duck-killing turtles he abominates into a best-selling soup. "Turtle soup," chortles the adman, captioning a pallid portrait of a lady in crinolines, "saved the sweethearts and mothers of a proud and gallant race." Another neighbor, variously known as Blackburn, Malatesta and Swarzkopf, turns out to be the Devil, and delivers some of Author Wilson's most envenomed and heartfelt opinions (notably on Stalinism) in a monologue written entirely in French.

All-Fours Romp.

The high points in the *Memoirs* are Mr. Wilson's soon-to-be-notorious love story, *The Princess with the Golden Hair,* and *The Milhollands and Their Damned Soul.* The *Milhollands* is an uproarious all-fours romp through the whole world of U. S. writing, publishing and book-promotion. There is the eager young Yaleman who, after feeling that his "generation" has been "betrayed," first by T. S. Eliot and Ezra Pound, then by the Marxists, winds up ballyhooing bellywash on national hookups. There is the Purity League's investigation of the *Booklover* when its personal columns sprout a rash of "advertisements by 'gentlemen of robust constitution' in search of 'non-prudish ladies responsive to the new dance rhythms.' "

There is the honest, talented writer who has never published a serious book, but priggishly signs his detective stories with a nom de plume. He winds up cadging drinks, clowning out parody first lines of poems, and warming up bedroom scenes in a hack-written best-seller about two U. S. families who take part in every war since the Revolution ("After all, I was the person who suggested the whole idea of having Nancy Gaylord be the mother of Walt Whit-

POOR COPY

BLEED THROUGH

man's illegitimate child—it's terrific. He meets her at the Mardi Gras and lays her on a cotton bale—she realizes for the first time that the Yankees are not all as bad as she'd thought.") The satire is not intended to cut deep, but it is an enlightening and timely tract on current U. S. literature's peculiar disorders and needs.

Marriage of Heaven & Hell.

The Princess with the Golden Hair is a quiet but ambitious attempt to anatomize, through the narrator's contrasted affairs with two women, the U. S. middle class and the U. S. proletariat. The bourgeois wife, Imogen, is a convincing redigestion, in contemporary terms, of the kind of paralytic romanticism which Flaubert raged at (and suffered from). The proletarian taxi-dancer, Anna, is more vivid and engaging, and the glimpses into her world—a world of incidents like the Polish boarder's "doing his business and wrapping it up in paper" for Anna to pick up—are the most detached that any writer, left or right, has yet furnished on behalf of the U. S. working class and of its well-wishers. Psychologically, the story is weak in its failure to convince the reader that a man of the narrator's intelligence could pursue Imogen for two years without suspecting her obvious neurosis. Censors and eager beavers will be satisfied by certain passages which cannot be quoted in a magazine; adult readers may not be. It is possible to respect Edmund Wilson's intention and attempt without feeling that he has succeeded in what he tried.

Critic Wilson's purpose is to develop a subtle and ambitious theme of Evil in our times. His observations are not always adequate to his ultra-sophisticated posture; hence the posture sometimes looks a little self-deceived. But such civilized writing and observation are rare in the U. S. nowadays, and on its merits *Memoirs of Hecate County* is pretty certainly the best contemporary chronicle, so far, of its place and period. Evil is as vivid through the book as a bushful of snakes.

The Devil in the Suburbs

Memoirs of Hecate County. By Edmund Wilson. New York: Doubleday and Co. 1946. 338 pp. $2.50.

Reviewed by Harrison Smith

When the man who is the sharpest and most readable literary critic of our time produces a long work of fiction he is laying himself wide open to attack. He who has assaulted so many fly-blown reputations and flattened so many writers who were hailed as budding geniuses may expect to find himself in the direful position of the armed knight of old who was pushed off his horse and lay helpless on his back where the common soldier might have a go at him. In this book he is attacking the suburban middle class whom the depression left so benighted and lost during the early thirties. This is a subject on which Mr. Wilson has touched in his book, "The American Jitters, the Year of Slump," 1931, and to which he returned four years later during his short love affair with Communism, in his "Travels in Two Democracies." He has an agile mind which embraces economics and literature with equal fluency.

His protagonist is an unmarried middle-aged dilettante who is trying to prove something by attempting to place art and economics in the same bed. But the reader will be more interested in his shrewd observation of the distraught lives about him rather than in his own opinions; and distraught they certainly are, with a touch of the diabolic, that is somehow or other not quite convincing, that is Mr. Wilson's own contribution. The little devils of hell can be caught now and then looking out of the eyes or peering over the shoulders of his characters. Most imaginative and over-read men may have these moments after a few post-prandial drinks when an ordinary room or a plainly neurotic woman seem to reveal a glimpse of the dark pit.

POOR COPY

BLEED THROUGH

"Memoirs of Hecate County" is named after the triple-headed goddess of midnight and black magic, but you will have to plow through a great many pages before you feel that genuine *frisson* up and down your back which is produced by some of his scenes. The three short novels which form the greater part of the book are prefaced by three satirical sketches which are variously interesting, if not absorbing. The best of them is perhaps "Glimpses of Wilbur Flick," a study of a frustrated rich man who finds in sleight-of-hand and parlor magic an excuse for his otherwise useless life, interspersed with the kind of hairbrained discussions of economics and technocracy which swept over young radicals and older men who had any money at all in those bad old days before prosperity swept over us again via the Second World War. It might be said that the book would be less confusing to the ordinary reader if it had contained only the short novels which are to a considerable extent related and which are penetrated by Mr. Wilson's diabolic undertones. Without these sketches, "Memoirs of Hecate County" would be over a hundred thousand words long and that ought to be long enough for anyone, though Mr. Wilson describes his innumerable characters and the effect they have on him with determined brilliance and clairvoyance. In the last long novel, "Mr. and Mrs. Blackburn at Home," it is indeed rewarding to come across this horrendous conception while the hero is kissing a responsive lady, "She seemed to me to be as voracious and hot as I had ever known her before . . . her lips parted in such a way as to show great long bare-gummed teeth that stuck out and yet curved back like tusks and that seemed almost too large to be contained in her mouth. She looked like a dog panting when you take it out for a drive. . . . I pounded kisses against it, etc. etc."

But a greater reward for the curious can be found in the longest of these novels, "The Princess with the Golden Hair," in which there are embedded some of the most frankly erotic passages that can be found in the modern writing that need not be sold under the counter. These amorous episodes, vaguely reminiscent of Frank Harris's

autobiography, will doubtless be the subject of controversy for some time to come. They are the result of the hero's reminiscences of his adventures among women about 1920 when he had gone on a tour of the art galleries abroad to live in New York, to walk in the evenings along Fourteenth Street and observe "the big-hipped, cat-faced women whose photographs were shown as lures in front of the burlesque theatres." These bare-skinned descriptions of love affairs, with nothing omitted, are, one might say, not in the least pornographic, if one accepts that word in any adult and intelligent way, but they are not especially revealing of anything except the flesh of the human animal and, oddly enough, the hero in his middle age seems somewhat priggish in his recollections of them from his salad days. But a great deal of what is fine and accurate writing and observation in "Memoirs of Hecate County" may be swept away in the minds of future readers by the notoriety that these scenes will evoke. We have managed to keep at bay the literary censors and the keyhole peepers who insist that books should not be printed that their little Lucy should not read. It would be unfortunate and ironic if our foremost literary critic should rouse these dogs to bay at literature again.

As a social and literary critic, Mr. Wilson's opinions are founded on an almost puritanical morality, as you will see if you read "Axel's Castle." He is always clear and direct and absorbing even when he has taken the privilege of a free man to change his mind. But what has become, in this confusing and cynical work of fiction, of the mind that has conceived his earlier books? Has the devil at work in the suburbs darkened Mr. Wilson's memories of the Lost Generation so that many of his characters, who can sometimes be labeled with living names, seem distorted and intermingled like the figures in a nightmare?

POOR COPY

BLEED THROUGH

KNICKERBOCKER WEEKLY

July 22, 1946

On Edmund Wilson and Sundry Reflections

Memoirs of Hecate County, by Edmund Wilson. Doubleday & Co., New York, 1946. 338 pp. $2.50.

Edmund Wilson's *Memoirs of Hecate County* is on the best seller list! This, indeed, desrves an exclamation point. For Edmund Wilson doesn't belong on the best seller list and he doesn't belong there precisely because of his excellence.

A statement like the one above may sound contradictory, but readers who are familiar with contemporary American literature will get my point. However, for those who like to read anything they can lay their hands on and for those who let themselves be guided in their choice by the amount of advertising a certain book gets, in other words for those who fall for the tricks of the publishers' promotion department, the statement needs further explanation.

Literature in America has suffered from what I would like to call the production bug. More than anywhere else in the world good writing is being dragged down into the stream of mediocre and downright bad writing labeled "Literature." The mistaken notion that art should stoop to meet the people's taste has found a conspirator in the publishing world. Cheap, unimaginative books with a large promotion budget behind them make the best seller list, whereas the original, fine prose on which the publisher refuses to gamble mostly ends up in the publisher's basement.

Even several decades ago Havelock Ellis wrote in his essay, *The Art of Writing*, that " . . . if we wish to compare the condition of things to-day with that in an age when people wrote at the bidding of some urgent stimulus from without or within, we have at the outset to delete certainly

over ninety-five per cent of our modern so-called writers before we institute any comparison. . . ."

In this country, instead of going up, literary standards now seem to be declining even faster than Havelock Ellis could ever have dreamed. Everybody writes. The stimulus of money and glamour seem to be stronger than the urge from within or the voices the true writer catches from without. And publishers who made huge profits because of wartime conditions accepted manuscripts without having to consider their budgets first, launching them under big, harsh-colored banners. There is no end to the superlatives they use in their advertising and on the dust jackets: *. . . great literature . . . the greatest story ever written . . . surpasses anything a writer ever put down on paper. . . .* This winter in Chicago I discovered a sign outside a bookshop which read: "Buy while they last . . . *Forever Amber!*" A pretty low level in the practice of bookselling. Incidentally, *Forever Amber* sounded the beginning of a flood of literary prostitution.

The publication of this kind of books definitely marks an era in which money guides the writing profession. The instigator of these sorry affairs has been the movie industry, which, years before the war, was already bending over backwards to lower the artistic standards in this country and is mainly responsible for the bad artistic reputation the United States have abroad—a reputation which is wholly undeserved. Anybody who has lived in this country sufficiently long to have an opinion (and I mean longer than six weeks, the time granted our Dutch press representatives) and who made it his business to check up on cultural achievements, will agree with me that the arts in America are vigorously growing and blooming. But now it seems that Hollywood has decided to do its best to corrupt literary standards. As Wolcott Gibbs put it in *The New Yorker*, reviewing a book by Louis Bromfield: " . . . he writes with arms outstretched towards Hollywood . . ." Indeed, it takes an author with integrity and literary convictions to keep

POOR COPY

BLEED THROUGH

on writing with his back turned to the movie city. Hollywood money is a strong magnet and a corruptive influence on the world of writers, agents and publishers.

It is no easy matter for the public to know what to read and what to pass by. Good judgment requires some knowledge of American literary tradition and the urge to get acquainted with contemporary writing. For my compatriots here and abroad it is even more confusing—American literature was badly neglected in Dutch schools and at the universities. The books sent abroad by official and semi-official institutions shortly after the war were typical of official propaganda; it was a poor selection without artistic value.

The urge to become familiar with the best in American literature can well be satisfied by reading the different magazines which are sold in large bookstores in midtown New York and other big cities and on the stands in Greenwich Village, sometimes called the Montparnasse of New York. These magazines are: The *Partisan Review, Virginia Quarterly, Suwanee Review, Harpers Magazine,* the *Atlantic Monthly* and others.

The best literary reviewing outside of these specialized periodicals is being done by Edmund Wilson in the *New Yorker,* a quite unique weekly of sophisticated humor, one of the world's best.

Edmund Wilson's book reviewing comes closest to the criticism we were accustomed to see in the literary columns of some of the very best Dutch magazines before the war. This writer possesses the intellectual background, analytical faculties, the mind to dissect and reassemble the truth, the appreciation of originality and the feeling for logic that make the superb critic. In *Axel's Castle,* which was published in 1945, an illumination of the works of Yeats, Joyce, Eliot, Stein, Proust and Valery, he proves that he is one of the world's most important literary critics.

His latest fictional work, *Memoirs of Hecate County,* shows the same qualities as we mentioned above. The

volume comprises six different stories and short novels, laid apparently in Westchester County, north of New York, which the author here calls Hecate County, after the Greek goddess of the moon, earth and underworld. It appears from these tales that Mr. Wilson himself lived in Westchester County and mingled with some of the people who live there either all year round or during the summer. Although Mr. Wilson mingles, he remains the dissecter and philosopher, even when he seems to be emotionally involved in the affairs of his neighbors. In fact, he "seems" to be involved but never really is; the critic never loses his identity. Consequently it has been argued that Mr. Wilson isn't a writer of fiction, for he never gets beyond the circle he has drawn around his own personality. In a way the publisher admits this side of Edmund Wilson's character, the inability to step across the border between himself and others: they printed on the dust jacket, ". . . the adventures of an egotist among the bedeviled."

Of the six stories in this book I liked the first best: "The Man Who Shot Snapping Turtles," a completely original tale about a man who makes the best of an annoyance, or rather makes profit out of a neurosis. It is a tight and brilliantly written narrative. Next to this I enjoyed best "The Princess With the Golden Hair," the story of a man's love for two entirely different women so convincingly true that from now on my mind will not be able to separate Mr. Wilson from this, his experience. It shows the author's courage and honesty, sophistication and, in a way, a certain emotional immaturity, so common with men in this hemisphere. Severe critics, of which Mr. Wilson as a provocative personality, has many, have argued that the story in itself is immature and pornographic. I don't think so. It is rather the true picture of the American man in the stratum of society where people like Mr. Wilson linger. A world full of intellectual, egotistical and immature men, intelligent, emotionally starving society women, and lower class girls with a lot of dignity and sense, but forever victimized.

POOR COPY

BLEED THROUGH

Getting back to the best seller list, Mr. Wilson's uncompromising critics have snickered that his book is on this list of the most widely read books because of its pornographic paragraphs. By saying this they have substituted the word pornography for honesty and artistry and proved to have a very poor literary appreciation. The revealing passages are part of his minute cataloging of what might in other authors be emotional response but in him is realistic observation.

There may be people who buy *Memoirs of Hecate County* for the "Purple" in it, but in looking for those paragraphs they will have to read the book and there is a good chance that they will acquire a taste for good literature. As long as they are not leafing through *Forever Amber* with the same purpose in mind, it is all right with me.

DOLA DE JONG

(*As we go to press we hear that Mr. Wilson's book has been seized by the New York police at the request of the New York Society for the Suppression of Vice. New York seems to be jealous of Boston's dubious Puritan reputation. We are quite certain that the Society will not suppress vice by these methods, and we hope that the courts will show that it cannot suppress good literature either.* —The Editor.)

THE NEW REPUBLIC
March 25, 1946

BOOKS IN REVIEW

Limbo-by-the-Sea

Edmund Wilson's new book, *Memoirs of Hecate County*,[1] is a cycle of six long stories; in other words, it is an example of a rather new literary form developed in this country as the result of a conflict between writers and their public. The American public reads stories in magazines, but in the past it has most often refused to buy them when they were collected between cloth covers; decidedly it prefers novels. American writers, on the other hand, have shown no such natural bent for writing novels as exists in England or Russia and, to a lesser extent, in Germany and France. Their best work has often been done in another medium, the novelette or short novel or long story, for which there was neither a book nor a magazine market (nor even a single name, until Whit Burnett adapted a European word and called it the "novella"). The result was a compromise: many of the writers began grouping their long stories into cycles that dealt with one background or a single group of characters; thus, they continued working in their own medium while giving the same unified effect as in a novel.

Memoirs of Hecate County is a successful example of this new form, a better and firmer piece of work than *I Thought of Daisy*, the novel that Wilson published in 1929. Partly that is because his style (no longer Proustian), his sense of construction and his judgment of persons have all developed in the intervening years; but also, like most American writers of our time, he seems more at home in stories. He likes to take up a character, develop him to a

[1]Memoirs of Hecate County, by Edmund Wilson, New York: Doubleday and Company. 338 pages. $2.50.

POOR COPY
BLEED THROUGH

certain point, then let him drop out of the book as friends drop out of our lives; perhaps returning to him later in another story, as if a college chum had stopped us on the street. He can build a long story firmly and continue it to the end, whereas his one novel always seemed to be starting and stopping as if it too were really a collection of tales. At the same time, all six stories in the volume fit into one physical and social and moral frame.

Hecate County is situated on the seacoast within two or three hours of New York; in its physical aspects it seems to be a combination of Monmouth County, New Jersey, and Fairfield County, Connecticut, with several features borrowed from Cape Cod. Socially it is inhabited during the summer months by prosperous middle-class people, all of them bright, talkative, well read, alcoholic, and many of them engaged in publishing or the arts. Morally it is the scene of a conflict between good and evil, in which evil is stronger and more personalized—one of the characters is or appears to be Satan himself—and wins minor victories one after another, but never achieves a complete triumph. The first story, "The Man Who Shot Snapping Turtles," fixes the moral atmosphere. Asa M. Stryker, a rich man of the neighborhood, loves the wild ducks that breed near his pond and hates the snapping turtles that eat the ducklings. He says, "If God has created the mallard, a thing of beauty and grace, how can He allow these dirty filthy mud-turtles to prey upon His handiwork and destroy it? . . . If the Evil triumphs there, it may triumph everywhere." Finally Mr. Stryker becomes so obsessed with the malignity of the turtles that he changes his aims, drives away the ducks, starts a turtle farm and becomes richer still through selling turtle soup. He takes the side of Evil, and it destroys him.

"Ellen Terhune" is almost a very fine story, almost, I should say, on a level with the good later work of Henry James—with "The Jolly Corner," for example, which it resembles in mood. It deals with a middle-aged woman

composer who is going insane and lets her obsessions appear in a sonata that she is unable to finish. She involves the narrator in her problems and hallucinations. Every time he visits her house, he sees or thinks he sees a scene that is farther in the past: first he meets Ellen as a young woman just home from the Paris Conservatory, then as a lonely girl in her teens; then he sees her mother just before Ellen's birth, then her mother before marriage to Ellen's father. In this last scene, however, there is a modern intrusion: Ellen herself, in the next room, plays the sonata with which she has been struggling so long, and it proves to be an impressive piece of work. The narrator bursts into the room where she has been playing; and exactly at this point the story, which has been acquiring a baneful intensity, begins to lose conviction. The author flinches from the big scene toward which he has been building, the scene that will serve as an explanation and a catastrophic climax. There is no scene with Ellen at all; the music room is empty; and we learn in an epilogue that she has died of heart failure that afternoon in a cheap New York hotel.

"Glimpses of Wilbur Flick" is the portrait of a detestable rich man who becomes an angel or fat cat for the Communists; it seems to me the weakest story in the book. "The Princess with the Golden Hair" is the longest and comes near being the best as well. It describes the narrator's simultaneous love affairs with three women (are they the three aspects of Hecate, the goddess of magic arts?), and it begins with a marvelous picture of a golden-haired creature who lives as if in a fairy tale. But halfway through the story, one's interest begins to flag. The descriptions of love are so zoological, the narrator is so intent on making a safari through the bedroom with gun and microscope, that we find he is preserving only the stuffed and mounted hides of his love affairs; what has disappeared is simply their passion, the breath of their life. And the reader feels like those children in a very progressive school who went to their teacher with a question. "We know all

POOR COPY

BLEED THROUGH

about how babies come to be born," they said, "but what we can't understand is why people like to do it."

"The Milhollands and Their Damned Soul" is satire mixed with extravagant burlesque and mixed again with some accurate notes on the publishing world. Within the limitations of its method—which is to combine known characters and institutions, choosing the worst features of each—I should call it completely successful, good dirty fun.

"Mr. and Mrs. Blackburn at Home," the last of the six stories, deals with a character who is, or whom the narrator in his alcoholic confusion fancies to be, the Devil himself. Mr. Blackburn, as he is known in Hecate County, gives a long speech in old-fashioned French about his tribulations in the contemporary world, where the human malice that was his special domain has given way to an immense and impersonal cruelty; he is planning to start a religious revival in the hope of collecting just a few damned souls. After this speech, the story dissolves into a series of very effective alcoholic nightmares; the narrator wakes from them at last and decides to build a new life with one of his mistresses in the Arizona desert; but vainly, for he will carry Hecate County with him wherever he goes.

In the end, one feels that the six stories are more impressive in one volume than any of them would be standing alone. Besides having the unities of time and place and the personality of the narrator, they are also held together by a single mood of revulsion. It is a feeling on the part of the author and his characters that this sort of life for individuals can't go on indefinitely; that, if they are to continue living, they must find some ritual of purification, of death and rebirth into a new faith, that will give them a purpose in life beyond making money and finding new sleeping partners. They try all the fashionable drugs: alcohol and sex and sleeping tablets and psycho-analysis, not to mention Communism and Catholicism, but nothing seems to change in their world; there is always lightning on the horizon and thunder rumbling overhead; but, as in *The Waste Land*,

the storm never breaks and they are all left wandering in Limbo-by-the-Sea. This failure of all the characters to find a direction for their lives seems connected with the failure of the separate stories and of the book itself to find any sort of climax, except in drunken nightmares. The weakness in technique that one felt at the end of "Ellen Terhune" is also a weakness in the book as a whole; and it is essentially a lack, not of skill or technique, but rather of animal faith.

MALCOLM COWLEY.

BLEED THROUGH

POOR COPY

TOMORROW

June, 1946

MEMOIRS OF HECATE COUNTY

By EDMUND WILSON.
Reviewed by JOHN RICHMOND.

Hecate is the Greek goddess of midnight and magic. Hecate County is the mythical name of a suburban paradise populated by hardbitten folk, restless and confused, suave and urbane. Once many of them guzzled bootleg liquor and were scared by the depression; today they scorn the UNO and are frightened by the atom bomb. They are described with brilliance, erudition, and keen insight by Edmund Wilson in his six satiric interrelated stories called *Memoirs of Hecate County*.

One of America's most distinguished literary critics and currently the book reviewer of *The New Yorker*, Mr. Wilson chronicles the memoirs of a nameless man who appears in each story and is sometimes the narrator, sometimes the leading character, and always obviously erudite, egotistic and subtly formidable, a lonely man.

The most original and macabre story is "The Man Who Shot Snapping Turtles." Its hero's chief conversational topic is the princely and majestic wild ducks which float gracefully on his small pond. Unable to prevent them from being devoured by snapping turtles, he broods over his helplessness until the obsession turns into a kind of religious mania, in which the ducks become forces for good continually destroyed by the forces of evil, the snapping turtles. He determines to outmaneuver the forces of evil by exploiting them. He breeds turtles commercially, and aided by a neighbor devises a "Snapper Consomme" with a wide appeal which piles up huge profits. His eventual defeat and destruction are a bit of intense irony.

"Glimpses of Wilbur Flick" is a study of a rich and rootless frustrated man floundering in search of a satisfying pursuit to compensate for his useless existence. He tries

alcohol, narcotics, psycho-analysis, the Catholic church, and an American Fascist movement, finally winding up a convert to Communism in the company of ineffectual left-wing intellectuals, where he finds a dubious happiness and solace. Such social maladjustments were quite common in the tumultuous thirties, and Wilbur Flick has been portrayed sharply, wryly, honestly.

The most penetrating and powerful story, however, is "The Princess with the Golden Hair," which relates with considerable detail a man's affair with two women: Imogen, the golden-haired princess, the beautiful and neurotic wife of a successful advertising executive; and Anna, a loyal, simple Brooklyn dance-hall hostess. Although the prurient may perhaps regard the passionate but realistic scenes of lovemaking as pornography, sensitive, intelligent adults will recognize this story for more than a hauntingly beautiful description of all the nuances and depths of a man's true love for a woman. Its ending is a merciless reflection of our present civilization. The man realizes it is Anna who has given him ". . . something so strong and instinctive that it could outlive all the hurts and infections, the defilements, among which we lived . . . a belief and a beauty that could not be justified or explained . . ." But he fails to marry her even when she needs him most desperately, because he does not have the courage to bring her to Hecate County.

"The Milhollands and Their Damned Soul" is a satirical castigation of commercialized literature, personified by three brothers. One heads the selection committee of a big book club; the second reviews for the radio popular novels he calls classics; and the third edits a literary weekly famous for its frisky personal columns. The low estate of American letters is adroitly revealed—and convincingly explained.

These are the outstanding chronicles in a collection of serious stories, which are entertaining, intelligent, socially observant, and civilized. Mr. Wilson has written what appears to be the definitive book about a group of people who have failed both the world and themselves spectacularly.

Doubleday, $2.50.

POOR COPY

BLEED THROUGH

PARTISAN REVIEW

Summer, 1946

Le Misanthrope

Memoirs of Hecate County. By Edmund Wilson. Doubleday. $2.50.

In its mordant analysis of our middle-class culture, in its pessimism and in the symbolic attempt of its hero to find his true class, this book resembles *The Education of Henry Adams*. But its real counterpart in American writing is a dark and distorted parable by Melville called *The Confidence Man*. I have never thought the latter a good novel, though I respect the force with which Melville described the moral bareness and deceptions of his time; and though Mr. Wilson's book is better, it is not very good either. Unfortunately, perishable books get praised, poor books are genially tolerated; we are always kind to books that do not simply annoy us. *Memoirs of Hecate County* has enough in it to make the fortunes of a dozen writers; but it is not a good book. The judgment is proportionate to Edmund Wilson's gifts, which are extraordinary and sometimes unpleasant, and to his peers, who are very few in this country.

Mr. Wilson's books have always come to us dangling an historical key with which to open them; with it we can open them—just that. His mind takes wings from references, historical associations, the personal details behind a career. The elaborate symbolism of this book, for which we are prepared by the myth of Hecate, the epigraph from a horror story by Gogol that prefaces it, and the excessive tension with which the settings are given, is another example of Mr. Wilson's mind working in the historical underbrush. The architectural and domestic references in it—houses, gardens, manners, costume, furniture—even weigh his pages down. Yet it is a sign of the deeper claims of his imagination that these "keys"—the Finland Station, Axel's Castle, Hecate, the artists who are triple thinkers, the

wound of the artist and the bow of his art—are only overtures to the conflict between the superior individual and society that is his main subject. Very few people in the large audience that has profited from *Axel's Castle* reached the castle itself, the workshop of symbolism; no one can forget Proust locked up in the "Heartbreak House of capitalist culture." The Finland Station in Petrograd, 1917, was a symbol of the struggle of man to reach an appointed destiny in his modern determination to change the world. But if Lenin arrives at the station on time, it is without the emotion of the Revolution. Half-way through the book Mr. Wilson went sour on Marxism, and it is the romance of Marx that we remember, not his theory or the way millions of lives have been changed by it.

Mr. Wilson's subject is history, and in history the personal careers shape its meaning for him. His masterly study of Dickens in *The Wound and the Bow*, a far better short story than any in this book, was yet only a way of showing Dicken's fate in the social structure of England. In this book, too, his interest is in careers, not in lives. A career is a complete cycle, seen from the outside, which can present to a mind like Mr. Wilson's the dramatic episodes of a life. But a life is built up inductively, from the universal nouns of human experience; it is slow work, it is threadbare, it is fiction. Mr. Wilson is not really interested in fiction; only in using it to put a floor of imaginary detail under his historical commentary. The fact that he can employ the apparatus of fiction with technical brilliance does not contradict this point; it only makes it a sadder one. For Mr. Wilson is too imaginative a writer and too complex a personality, driven by too insistent a personal ache, as artists must be, to analyze events in their "objective" appearance merely. He is too involved in the cross-stimulation of man and his outward culture to escape the library; or rather, the cultural dream which so often is life for him. He has been an example of a kind of transverse talent which is common in France, where ideas become conscious forces. I

POOR COPY

BLEED THROUGH

have the greatest admiration for this talent, which is so much like Henry Adams's, and like Adams's, driven by a longing for excellence, true aristocracy, and a social home. But it is a talent whose roots have got a little twisted in Hecate County. For Mr. Wilson's view of history is now merely mordant. Lives are still closed to him; that is, he is still more interested in careers than in character. The historian prods the novelist; the novelist wants to break through the mask of history, but has long ago forgotten its exchange-value back into particular human terms. All experience is devaluated into symbols. Meanwhile, the man wants to tell us something direct about himself, and has made sure that he will not. The result is to reduce the book to a curiously covert kind of commentary.

Hecate is very congenial to Mr. Wilson's mind at present. "Where three roads meet, there is she standing." Tri-formed, bearing torches, a snake, a club, a key, etc., she represents the cross-roads and the phases of the moon. Light and darkness alternate through her. So that we see her and yet do not see her, as a man will struggle to see a figure in his dreams. "Hecate County" is clearly meant to be the landscape of a type of middle-class mind in this country. We see it in the acute period of the American crisis, between Hoover and Hitler. Around this region Mr. Wilson has traced the marks of the deepening world crisis and the challenge to the democratic and moralistic faith of the West by the totalitarian states. The narrator is the real hero; all its threads are in his hands. He has no name. He is a young art-critic, trained as an economist; his main interest is the history of painting "from a social point of view." His family is a cultivated one; his father is a financial expert for one of the big companies in Detroit. The father is a scholarly technician, in fact, who is of service to the management side of industry, but not of it. He is indifferent to its social drives. This background has a suggestive resemblance to Mr. Wilson's own, for he comes from a professional yet unmetropolitan background which

gave him the sense of belonging to the pre-corporate side of American life and at the older, less frantically acquisitive, end of the American middle-class. Like Mr. Wilson, the narrator detests the new bourgeois culture of twentieth-century metropolitanism and feels he has transcended its values through an intellectual occupation. At the same time he cannot free himself of Hecate County, of the immediate frivolities of his immediate social group. Nor can he descend—despite his radical sympathies—to the working class.

The main subject of the book is the narrator's attempts to learn his true social allegiance despite "the prison of the social compartments." Its main action consists in his attempts to locate this allegiance in his relations with three women. There is Jo, his friendly and frivolous mistress half the year, whom he resigns himself to at the end as the symbol of his social imprisonment. Jo is the narrator's immediate social life, as he lives it between sensual pleasure and self-contempt among the coktail set in Hecate County. When Jo is away, he finds himself simultaneously involved with Anna, a Brooklyn waitress and the daughter of disreputable immigrants, and Imogen, the romantically beautiful wife of an advertising-agency executive and a neighbor in Hecate County. Anna is the working-class, the immigrant underside of American life, the poor; the narrator is drawn to her strength, devotion and direct knowledge of life, but recoils at frequent intervals because of Imogen. She is the story-book past, the idealized memory, which represents the narrator's nostalgia, his vision of childhood in critical maturity. Hers is the world before Hecate County, and really before sex. Imogen is beautiful because she is essentially unpossessable, as the past is unrecoverable. She is also, as he learns long afterwards, neurotic rather than crippled, as she thinks she is. But her neurosis serves to keep her from any real personal risks and critical encounters, and represents the flaw in the past, its secret deceptions.

POOR COPY

BLEED THROUGH

In this three-fold world the symbolic reference is very wide. The three women represent not only phases of the different societies to which the narrator is attracted in turn. They represent also periods in time to which the hero returns in dreams; not always sleeping dreams. These are interpolated with great technical skill by Mr. Wilson and furnish increased knowledge of the past—I should say *documentation*—and taken together symbolize the alternate and negotiable levels of consciousness on which we live. The principal conflict takes place in "The Princess With The Golden Hair," which is the only one of the six stories that is occasionally moving. But it is caught up so repetitiously on the narrator's rigid design of all its meanings that it loses the advantages it has gained by awakening the mind with symbols. Nothing emphasizes this so well as the now-famous fullness of Mr. Wilson's descriptions of fornication. These are really pathetic, and the shop girl I once saw blinking in the IRT at the rush-hour, leafing through Mr. Wilson's book in the hope, was really in for a disappointment. Lawrence at least idealized what is so misleadingly, in modern times, called the act of love. Mr. Wilson's narrator is so locked up in his own mind that he seems to have his encounters only for what he shall think of them. Nothing could be further removed from passion; or even from neurotic conquest; or even from mechanical lechery. These scenes are thought masquerading as acts, and are not even the similes of acts; and they are not thoughts but the waverings of a mind weighing its social loneliness and confusion. The sex act here is the cosmetic of a philosophy; and I do not know what I dislike more in these scenes—the fact that the narrator is such a worm or the clutter with which Mr. Wilson conceals his distance from human intimacy. Yet Anna, whom Mr. Wilson has tried so hard to document in all her esoteric lowliness that she lives near something called *The* King's Highway in Brooklyn, and amid an assortment of no-goods drawn from every imaginable Sudetenland in Brooklyn—Anna does come through, for the narrator

COPY BOUND CLOSE IN CENTER

wants so hard to reach her world that he brings her alive under the pressure of his real emotion.

In three stories, "The Man Who Shot Snapping Turtles," "Glimpses of Wilbur Flick," and "The Milhollands and Their Damned Soul," Mr. Wilson describes vicious, idle, and deliriously acquisitive sides of American life—the eccentric cruelties, the lack of standards, the scintillating phoniness. There are fine satiric strokes in them all, especially in the last, concerned with literary politicians. More important, after "The Princess With The Golden Hair," are "Ellen Terhune" and "Mr. and Mrs. Blackburn at Home." In both dream sequences are used; in the first to recreate the troubled life-cycle of a brilliant woman composer, which the narrator, very close to her in his alienation from their social class, does through uneery sequences of her early and middle life. It is characteristic of Mr. Wilson's talent, which has great underhand force, that the machinery for this recreation and the late nineteenth-century interiors among which Ellen Terhune's tragedy is imagined, should be so much more lucid than the figure of Ellen herself. It is not Ellen whom we get to know in easy human detail; it is the sense of time, and its cruel undertow forever dragging us back into the past we blame; of the pathos of the family and its genteel heartlessness. Ellen's suffering is vivid, but she has been created not for what she is, but for what she concentrates, to Mr. Wilson's imagination, in the facts of her class and her type of career.

In "Mr. and Mrs. Blackburn at Home" Mr. Wilson pulls off his last feat and really gives us some of his inner thoughts. "Ellen Terhune" is the story of the late twenties and of the new intelligentsia that sought fresh thought in Europe. The Blackburn story begins on Europe in America, the refugees, the American dragging into war, and already reading something of the struggle in the refugees. The narrator goes to a party at the house of a vaguely European man of all affairs called Blackburn. The episode

POOR COPY

BLEED THROUGH

falls into a dream, interpolated in such a way as to blend the distinctness of sleep and the stupor of awakening, the symbolic depth of dreams and the hesitant shallowness of consciousness. Blackburn begins a conversation with the narrator on art, and suddenly going off into French, reveals himself disconsolately as the Devil. He has turned to French because events have become so irrational that only the neatness and precision of French can put them in order. He indignantly describes the Soviet purges, the forthcoming horrors of the Nazi terror, and ascribes them to the decay of organized religion—that is, of the Catholic Church. Ever since the Reformation, he complains, the diminishing belief in sin, in the reality of any struggle between good and evil, has robbed him of his occupation. The new nihilism has dispensed with God—"my distinguished opponent"—and therefore with him. He now sees his last opportunity in America, where there remains some deposit of religion, of belief in sin, and therefore in him.

A hit, a hit: but where are we with it? Dostoevsky needed to believe in the Devil, and finally convinced himself that he did. Mr. Wilson's Devil is briiliant, and the whole episode is an instructive tour-de-force; but his handling of it is frivolous. A generation ago writers divulged intimate details of the body only to those who knew a little Latin—your cultivation was the admission of your respectability. Mr. Wilson has similarly confined his full loathing of Stalin's Russia to those who are also a little *deracine,* like the Devil—the intellectuals without dogma, the homeless radicals; those who have paid, like Mr. Wilson, for their freedom of thought. But even from the point of view of the sympathetic reader, it is clear that the Devil serves only to dispose of Mr. Wilson's rather complicated irony and exasperation, since he cannot resolve them himself. The darkness of the moon over America in this story is very thick. What Mr. Wilson really feels like saying is, "The Devil take it!" And it is significant that the Devil is a European. Not the least of his uses here is to point up Mr.

COPY BOUND CLOSE IN CENTER

Wilson's disgust with Europe and to make a claim on America deeper than he makes out. It is not that he is Bernard DeVoto; his disappointment in America is profound, and its legendary "promise" in the West is bitingly satirized. But he is writing under the sign of darkness, and his narrator represents a social weariness, a poisonous neutrality between Anna's working-class life and Imogen's story-book past, that emphasizes the vacancy of his present. And emphasizes it in a world in which the old clerical serpents of absolute good and evil have suddenly come back; in the "Heartbreak House of Capitalist Culture," which is supposedly eternal. There is almost too much for Mr. Wilson to say at the end, for he says it all as an historical interpreter—that is, as a kind of journalist. And his misanthropy is so great that, in a curious last line, he tries to redeem it a little by saying, in effect, "Life and Time go on." But this excess of material, this disproportion of personal chagrin, are still only the marks of a novelist who has not *imagined* his material, but has used fiction to put his hostility on a different plane. Fiction, when it is done by the total imagination of the novelist, is never so unrelieved in its personal bitterness or so cluttered in its effects. It resides within its own economy. But as Mr. Wilson lacks the novelist's suspension of disbelief, the novelist's respect for experience, so he lacks the novelist's involuntary generosity. Like Melville in *The Confidence Man*, he can end his book only by sharply putting out the light. His book will live not because it is a work of imagination, but because it is a source-book in the sadness of Americans.

ALFRED KAZIN

POOR COPY

BLEED THROUGH

JEFFERSON'S LETTER TO N. DUFIEF

(Referred to in Footnote No. 6, Brief p. 29)

The following letter was written by Thomas Jefferson to his book seller in Philadelphia, N. Dufief, replying to Dufief's letter of April 6, 1814, in which he told Jefferson that he was being prosecuted for the sale of a book, De Becourt, *Sur la Création du Monde, un Systême d'Organisation Primitive,* which apparently had atheistic overtones. He asked Jefferson to help him because he had procured a copy of this book for Jefferson himself. The text of this letter is reproduced from Padover, *The Complete Jefferson* (1943), 889.

"April 19, 1814.

I am really mortified to be told that, *in the United States of America,* a fact like this can become a subject of inquiry, and of criminal inquiry too, as an offence against religion; that a question about the sale of a book can be carried before the civil magistrate. Is this then our freedom of religion? and are we to have a censor whose imprimatur shall say what books may be sold, and what we may buy? And who is thus to dogmatize religious opinions for our citizens? Whose foot is to be the measure to which ours are all to be cut or stretched? Is a priest to be our inquisitor, or shall a layman, simple as ourselves, set up his reason as the rule for what we are to read, and what we must believe? It is an insult to our citizens to question whether they are rational beings or not, and blasphemy against religion to suppose it cannot stand the test of truth and reason. If M. de Becourt's book be false in its facts, disprove them; if false in its reasoning, refute it. But, for God's sake, let us freely hear both sides, if we choose. I know little of its contents, having barely glanced

COPY BOUND CLOSE IN CENTER

over here and there a passage, and over the table of contents. From this, the Newtonian philosophy seemed the chief object of attack, the issue of which might be trusted to the strength of the two combatants; Newton certainly not needing the auxiliary arm of the government, and still less the holy author of our religion, as to what in it concerns him. I thought the work would be very innocent, and one which might be confided to the reason of any man; not likely to be much read if let alone, but, if persecuted, it will be generally read. Every man in the United States will think it a duty to buy a copy, in vindication of his right to buy, and to read what he pleases."

POOR COPY

BLEED THROUGH

EXCERPTS FROM JEFFERSON'S WORKS, REMARKS ON FREEDOM OF THE PRESS

(Referred to in Footnote No. 7, Brief p. 29)

In his *Proposed Constitution for Virginia* in June, 1776, Jefferson wrote: (Padover, *op. cit.* 103, 109)

> "Printing presses shall be free, except so far as by commission of private injury cause may be given of private action."

In his *Draft of a Constitution for Virginia* (June, 1783) he wrote: (Padover, *op. cit.* 110, 119)

> "Printing presses shall be subject to no other restraint than liableness for false facts printed and published."

Compare also *A Charter of Rights Established by the* [French] *King and Nation,* (1789) in which Jefferson wrote: (Padover, *op. cit.* 125)

> "Printers shall be liable to legal prosecution for printing and publishing false facts, injurious to the party prosecuting; but they shall be under no other restraint."

Jefferson also would have preferred that the First Amendment should spell out its protection of the press in the language he himself had long used. See his letter to James Madison, Paris, August 28, 1789, as reprinted in 7 *Lipscomb,* ed., *The Writings of Thomas Jefferson,* (1903-1904) at p. 456:

> "I must now say a word on the declaration of rights, you have been so good to send me. I like it, as far as it goes; but I should have been for going further. For instance, the following alterations and addi-

COPY BOUND CLOSE IN CENTER

tions would have pleased me: Article 4 'The People shall not be deprived of their right to speak, to write or *otherwise* to publish anything but false facts affecting injuriously the life, the liberty, property or reputation of others, or affecting the peace of the confederacy with foreign nations'."

BLEED THROUGH

POOR COPY

EXCERPT FROM TUCKER'S APPENDIX TO BLACKSTONE

(Referred to in Footnote No. 8, Brief p. 30)

The following quotation is taken from Judge Tucker's Appendix to *Blackstone* as it was published in 1803, 2 *Tucker's Blackstone*, Appendix, Note G, "Of the Right of Conscience; and Of the Freedom of Speech and of the Press" (pp. 11-12):

> "Liberty of speech and of discussion in all speculative matters, consists in the absolute and uncontrollable right of speaking, writing, and publishing, our opinions concerning any subject, whether religious, philosophical, or political; and of inquiring into and, examining the nature of truth, whether moral or metaphysical; the expediency or inexpediency of all public measures, with their tendency and probably effect; the conduct of public men, and generally every other subject, without restraint, except as to the injury of any other individual, in his person, property, or good name. Thought and speech are equally the immediate gifts of the Creator, the one being intended as the vehicle of the other: they ought, therefore, to have been wholly exempt from the coersion of human laws in all speculative and doctrinal points whatsoever: liberty of speech in political matters has been equally proscribed in almost all the governments of the world, as liberty of conscience in those of religion. A complete tyranny over the human mind could never have been exercised whilst the organ by which our sentiments are conveyed to others was free: when the introduction of letters among men afforded a new mode of disclosing, and that of the press, a more expeditious method of diffusing their sentiments, writing and printing also became subjects of legal coersion;

COPY BOUND CLOSE IN CENTER

even the expression of sentiments by pictures and hieroglyphics attracted the attention of the Argus-goverment, so far as to render such expressions punishable by law. The common place arguments in support of these restraints are that they tend to preserve peace and good order in government; that there are some doctrines both in religion and politics, so sacred, and others of so bad a tendency that no public discussion of them ought to be suffered. To these the elegant writer before referred to gives this answer: 'were this a right opinion, all the persecution that has ever been practised would be justified. For if it is a part of the duty of civil magistrates to prevent the discussion of such doctrines, they must, in doing this, act on their own judgments of the nature and tendency of doctrines; and consequently, they must have a right to prevent the discussion of all doctrines which they think to be too sacred for discussion, or too dangerous in their tendency; and this right they must exercise in the only way in which civil power is capable of exercising it, by inflicting penalties on all who oppose sacred doctrines, or who maintain pernicious opinions.'"

(The writing referred to is Price's *Observations on the American Revolution*, page 19.)

POOR COPY

BLEED THROUGH

EXCERPT FROM INGERSOLL'S ADDRESS

(Referred to in Footnote No. 9, Brief p. 30)

From *A Discourse concerning the Influence of America on the Mind; being the annual oration delivered before the American Philosophical Society, at the University in Philadelphia, on the 18th October 1823,* Philadelphia, A. Small, 1823, as reprinted in Blau, *American Philosophic Addresses,* 1946, pp. 29-30:

> "Not less than a thousand newspapers, some of them with several thousand subscribers, are circulated in this country; the daily fare of nearly every meal in almost every family; so cheap and common, that, like air and water, its uses are undervalued. But a free press is the great distinction of this age and country, and as indispensable as those elements to the welfare of all free countries. Abundant and emulous accounts of remarkable occurrences concentrate and diffuse information, stimulate inquiry, dispel prejudices, and multiply enjoyments. Copious advertisements quicken commerce; rapid and prevading publicity is a cheap police. Above all the press is the palladium of liberty. An American would forego the charms of France or Italy for the luxury of a large newspaper; which makes every post an epoch, and provides the barrenest corners of existence with an universal succedaneum. Duly to appreciate the pleasures of it, like health or liberty, we must undergo their temporary privation. Nor is our experience of the licentiousness of the press too dear a price to pay for its freedom. It is a memorable fact in the history of American newspapers, that while some of the most powerful have been consumed in the combustion of their own calumnies, on the other hand, the most permanent and flourishing are those least addicted to defama-

COPY BOUND CLOSE IN CENTER

tion. It is also a fact, that the most licentious newspapers which have appeared in America, were edited by Europeans. The American standard is equally removed from the coarse licentiousness which characterises much of the English press, and the constraints of that of the rest of Europe—and this standard has been established, while state prosecutions have been falling into dislike. Our newspapers are regulated by a public tact much truer and stronger than such ordeals. The same ethereal influence in a free temperature, is equally effective to preserve the good from obloquy, and to consign the unworthy to degradation. Where the press is perfectly free, truth is an overmatch for detraction. Many of our public men have constantly enjoyed the public favour, in spite of intense abuse; and have survived its oblivion, to receive a foretaste of posthumous veneration. Under the light of these results, the press has learned the value of temperance, and while all the avenues of private redress are open to those who choose to seek it, state prosecutions have nearly disappeared. Irreligious, obscene, and seditious publications, are infinitely more common from the English than from the American press: scurrilous and libellous newspapers exist to be sure, but they are the lowest and most obscure of the vocation; whereas in England, some of the most elevated and best patronised, are the most scandalous and personal. In the darker ages, dungeons, scaffolds, torture, and mutilation, were the dreadful, but vain restraints put on the understanding. Can it be supposed, that in this enlightened æra, punishment, however mitigated, will do more than inflame it? And what is the English law of public prosecution for libels, but a milder remnant of those principles? By which, infidelity, blasphemy, sedition, treason, and individual calumny, are provoked, disseminated

POOR COPY

BLEED THROUGH

and infuriated. Experience has taught us, that the freedom of the press is the best protection against its abuse, and that its transient licentiousness is part of the very nature of the blessing itself. The splendid skies, forests and foliage of America, with which Europe has nothing of the kind to compare, are inseparable from those vicissitudes and extremities of weather and seasons, which, while menacing desolation, purify and sublimate existence. This American deduction of the much apprehended postulate of the press, is obviously and rapidly gaining converts in England, whence perhaps it may ultimately spread over Europe, and abolish the pernicious alternatives there prevalent. Without it, the press must cause convulsions, and retard the progress of the mind. The English newspaper press, much less free by law than the American, is in practice much more licentious. A late number of the Quarterly Review, (which is no mean authority on such a point) admits, in so many words, that the occupation of the English daily press is, to 'do every thing that honor and honesty shrink from': to which character the absence of decency should be superadded. The Attorney General protects government from libels; but the Chancellor has brought about a most preposterous state of things between the right of literary property, and the want of right in obscene, blasphemous, or otherwise illegal subjects of that property."

COPY BOUND CLOSE IN CENTER

EXCERPT FROM DEWEY, *ART AS EXPERIENCE*

(Referred to in Footnote No. 20, Brief p. 35)

The following quotation is taken from John Dewey, *Art as Experience* (1934). It is from the last chapter in which Dewey is discussing the general relationship of art and civilization. Having declared that "as long as art is the beauty parlor of civilization, neither art nor civilization is secure", Dewey goes on to discuss the moral office of art and at pages 347-349 says:

> "It is by way of communication that art becomes the incomparable organ of instruction, but the way is so remote from that usually associated with the idea of education, it is a way that lifts art so far above what we are accustomed to think of as instruction, that we are repelled by any suggestion of teaching and learning in connection with art. But our revolt is in fact a reflection upon education that proceeds by methods so literal as to exclude the imagination and one not touching the desires and emotions of men. Shelley said, 'The imagination is the great instrument of moral good, and poetry administers to the effect by acting upon the causes.' Hence it is, he goes on to say, 'a poet would do ill to embody his own conceptions of right and wrong, which are usually those of his own time and place, in his poetical creations. . . . By the assumption of this inferior office . . . he would resign participation in the cause'—the imagination. It is the lesser poets who 'have frequently affected a moral aim, and the effect of their poetry is diminished in exact proportion as they compel us to advert to this purpose.' But the power of imaginative projection is so great that he calls poets 'the founders of civil society.'
>
> The problem of the relation of art and morals is too often treated as if the problem existed only on

POOR COPY

BLEED THROUGH

the side of art. It is virtually assumed that morals are satisfactory in idea if not in fact, and that the only question is whether and in what ways art should conform to a moral system already developed. But Shelley's statement goes to the heart of the matter. Imagination is the chief instrument of the good. It is more or less a commonplace to say that a person's ideas and treatment of his fellows are dependent upon his power to put himself imaginatively in their place. But the primacy of the imagination extends far beyond the scope of direct personal relationships. Except where 'ideal' is used in conventional deference or as a name for a sentimental reverie, the ideal factors in every moral outlook and human loyalty are imaginative. The historic alliance of religion and art has its roots in this common quality. Hence it is that art is more moral than moralities. For the latter either are, or tend to become, consecrations of the *status quo*, reflections of custom, reenforcements of the established order. The moral prophets of humanity have always been poets even though they spoke in free verse or by parable. Uniformly, however, their vision of possibilities has soon been converted into a proclamation of facts that already exist and hardened into semi-political institutions. Their imaginative presentation of ideals that should command thought and desire have been treated as rules of policy. Art has been the means of keeping alive the sense of purposes that outrun evidence and of meanings that transcend indurated habit.

Morals are assigned a special compartment in theory and practice because they reflect the divisions embodied in economic and political institutions. Wherever social divisions and barriers exist, practices and ideas that correspond to them fix metes and bounds, so that liberal action is placed under restraint. Creative intelligence is looked upon with distrust; the innovations that are the essence of in-

COPY BOUND CLOSE IN CENTER

dividuality are feared, and generous impulse is put under bonds not to disturb the peace. Were art an acknowledged power in human association and not treated as the pleasuring of an idle moment or as a means of ostentatious display, and were morals understood to be identical with every aspect of value that is shared in experience, the 'problem' of the relation of art and morals would not exist.

The idea and the practice of morality are saturated with conceptions that stem from praise and blame, reward and punishment. Mankind is divided into sheep and goats, the vicious and virtuous, the law-abiding and criminal, the good and bad. To be beyond good and evil is an impossibility for man, and yet as long as the good signifies only that which is lauded and rewarded, and the evil that which is currently condemned or outlawed, the ideal factors of morality are always and everywhere beyond good and evil. Because art is wholly innocent of ideas derived from praise and blame, it is looked upon with the eye of suspicion by the guardians of custom, or only the art that is itself so old and 'classic' as to receive conventional praise is grudgingly admitted, provided, as with, say, the case of Shakespeare, signs of regard for conventional morality can be ingeniously extracted from his work. Yet this indifference to praise and blame because of preoccupation with imaginative experience constitutes the heart of the moral potency of art. From it proceeds the liberating and uniting power of art."

POOR COPY

BLEED THROUGH

EXCERPT FROM ARTICLE BY VIRGINIA WOOLF

(Referred to in Footnote No. 23, Brief p. 36)

The late Virginia Woolf, noted English novelist and critic, and proprietor with her husband Leonard Woolf of the famous publishing house, The Hogarth Press, also suggested that if there should be any power to censor books as obscene (she was doubtful that there should be), the test must be the pornographic, *The Censorship of Books*, 105 The Nineteenth Century and After, 446 (1929).

She said (at p. 446):

> "* * * indecency * * * [may be] incidental to some other purpose—scientific, social, aesthetic—on the writer's part. The police magistrate's power should be definitely limited to the suppression of books which are sold as pornography to people who seek out and enjoy pornography. The others should be left alone. Any man or woman of average intelligence and culture knows the difference between the two kinds of book and has no difficulty in distinguishing one from the other."

It was her opinion that (p. 447) the law caused more harm to reader and writer than it prevents.

> "For both printer and publisher will be trying, uneasily and anxiously, to anticipate the verdict of the police magistrate and will naturally bring pressure to bear upon the writer to put them beyond the reach of the law. He will be asked to weaken, to soften, to omit. Such hesitation and suspense are fatal to freedom of mind, and freedom of mind is essential to good literature. Moreover, if modern books become so insipid, so blameless, so full of blank spaces and evasions that we cannot read them, we shall be driven to read the classics, where obscenity abounds.

COPY BOUND CLOSE IN CENTER

"For these reasons I think it desirable that the law should distinguish clearly between books that are written or sold for pornographic purposes and books whose obscenity is an incidental part of them —between Aristotle's works as they are sold in the rubber goods shops, that is to say, and Aristotle's works as they are sold in the shops of Messrs. Hatchard and Bumpus."

BLEED THROUGH POOR COPY

EXCERPTS FROM ARTICLES BY FORSTER

(Referred to in Footnote No. 23, Brief p. 36)

E. M. Forster, eminent English critic, essayist and novelist, author of the well known and respected novel *A Passage to India* (certainly none of whose works could be called "obscene" under any test), has said; "Liberty in England," *Abinger Harvest* (1936) 68-69:

> "* * * I want greater freedom for writers, both as creators and as critics. In England, more than elsewhere, their creative work is hampered because they can't write freely about sex, and I want it recognized that sex is a subject for serious treatment and also for comic treatment; this latter aspect of it is usually ignored by speakers when they get on to platforms, so I don't wish to miss out."

The same author has also delivered his opinion more explicitly in *The Censorship of Books*, 105 The Nineteenth Century and After 444 (1929):

> "I know nothing of the law, and should only waste your readers' time if I attempted to amend the Campbell Act or to substitute for Cockburn's ruling some ruling of my own. I consider the Act, as at present interpreted, is both unfair to writers and against the public interest, but all I can do is to indicate three problems which seem to me important.
>
> "(1) Pornography. It was, I believe, to deal with pornographic books that the Campbell Act was passed. Such books ought to be suppressed, and they are easily detected and classified, for the reason that their aim is not literature but physical provocativeness. When, however, attempts are made to apply the Act to cases it was never intended to meet,

COPY BOUND CLOSE IN CENTER

> and to condemn books that are not pornographic at all, I find myself in complete opposition. To say of a book, as our Puritan reformers do, that it is 'spiritually corrupting'; that it is 'subtly insidous', that it 'has undesirable tendencies', that it is 'a borderline case' may sound very high-minded and helpful, but it opens the door to evils far more serious than any it might keep out, to official meddlesomeness over the whole of literature, to the paralyzing of authors, who can never be sure what they may or may not say, and to the exclusion of the public from its legitimate rights to aesthetic enjoyment and to information. No doubt it would be well if we could define 'spiritual corruption' and could legislate against it accordingly. But we cannot, for the reason that spiritual things are things of the spirit. The only safe test in the law is the pornographic, and it is the only point on which the police should prosecute and the courts decide."

Forster goes on to discuss blasphemy and homosexuality; of the latter he says (at p. 445):

> "It forms, of course, an extremely small fraction of the sum-total of human emotions, it enters personally into very few lives, and is uninteresting or repellent to the majority; nevertheless, it exists, and this being the case, I do not see why writers who desire to treat it should be debarred from doing so—always providing that there is nothing pornographic in their treatment."

BLEED THROUGH POOR COPY

EXCERPT FROM ARTICLE BY NEILSON

(Referred to in Footnote No. 23, Brief p. 36)

William Allan Neilson, late president of Smith College, professor of English literature at Harvard, Columbia and the University of Paris, author and editor of many books on literature (See *Who's Who in America*), has said in *The Theory of Censorship*, 145 Atlantic Monthly 13, 14 (1930):

> "No one disputes the necessity of different measures in dealing with the mature and the immature, since, apart from a few extremists, all our educational measures take for granted that the young may be guarded from risks that may inflict injury before experience has been acquired and before reason has been developed to the point where the significance of the risks can be appreciated. So, in the case of certain types of literature, plays, and pictures, it is justifiable and probably necessary to seek to prevent the young from being exposed to them while their imaginations are highly impressionable and their self-control is undeveloped."

Neilson goes on to emphasize that this is a matter for parents and teachers rather than the police, but he suggests that prohibitions on sales to minors, on the analogy of the prohibitions on the sale of liquor, could be made in connection with books.

> "When we turn from the protection of adolescents to the problem of the adult, a quite different point of view is imposed, though certain prohibitions still seem to be justifiable. The adult has a right to be protected against display of offensive print or pictures where he cannot avoid them. The covers of books and magazines, and still more posters, are a fair subject of police control, since it is practically

COPY BOUND CLOSE IN CENTER

impossible not to have them thrust upon one's notice. Nor is the risk of poor judgment in selecting those to be suppressed an important one. One cannot honestly pretend that even a mistakenly rigorous policy in such matters would deprive the world of either truth or beauty to a noticeable degree." (at pp. 14-15)

"The opposition to the activity of the censor, however, has not been roused by attempts to save the sensibilities of the public from the outrages of the poster or the jacket. It has been due to the feeling that some branch of the government—post office, customs official, police, or mayor—has sought to save us without our consent from what it considered a demoralizing book or play. The resentment is due to what seems to many an officious intrusion, an interference with the responsibility of the adult individual for his own moral welfare." (at p. 15)

Then he discusses some absurdities: the fact that banned books sell better, etc.

"These absurdities in the administration of censorship serve only to strengthen the independent thinker's resentment against the essence of the practice. The saving of a man's soul, which one must presume is the object of the censorship, is after all a man's own affair and not to be achieved by external compulsion or guardianship. It is of a man's free will that he buys a ticket for a play or borrows a book from the library. If he wants to pander to the lower side of his nature, no censor will prevent him.

"Such arguments sometimes lead defenders of the censorship to abandon the strictly moral issue and seek a basis for suppression on aesthetic grounds. But it is clear that these give no firmer footing. The whole question of standards in art is dragged in,

POOR COPY

BLEED THROUGH

and it becomes evident that the result of decisions on the ground of good or bad art could only be the legalizing of the timid and conventional, and the blocking of all progress by the suppression of innovation and experiment. The fact that my personal taste is offended does not give me the right to interfere with my neighbor's choice of reading or of plays, unless he insists on reading aloud in my presence or forcing me into the theatre.

"A variant of the aesthetic argument is that which advocates prohibtion of a production because it deals with disease. The pathological, we are told, is no fit subject for art. But no one really believes in a principle that would prohibit *Hamlet*, *Lear*, and *Macbeth* because all three interest us in madness."

"* * * it is through freedom and not through compulsion that the human spirit gains in power and reach." (at p. 16)

COPY BOUND CLOSE IN CENTER

FILE COPY

FILED
JAN 19 1948
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. [redacted] 11

DOUBLEDAY & COMPANY, INC.,
Appellant,

vs.

THE PEOPLE OF THE STATE OF NEW YORK

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

FRANK S. HOGAN,
District Attorney of New York County,
WHITMAN KNAPP,
Assistant District Attorney of New York County,
Counsel for Appellee.

BLEED THROUGH

POOR COPY

INDEX

Subject Index

	Page
Motion to dismiss or affirm	1
Preliminary statement	1
Introduction	2
The statute	2
The book	2
No substantial question is presented	3
Conclusion	4
Appendix—American Obscenity Statutes	5

Table of Cases Cited

Chaplinsky v. *New Hampshire*, 315 U. S. 568	3, 4
Doubleday & Co., Inc. v. *People of the State of New York*, 272 App. Div., 297 N. Y. 687	1
Rebhuhn v. *Cahill*, 31 Fed. Supp. 47	4
Robertson v. *Baldwin*, 165 U. S. 275	3
Tyomies Publishing Co. v. *U. S.*, 211 Fed. 385	3
United States v. *Harmon*, 45 Fed. 414, 50 Fed. 921	3
United States v. *Journal Co.*, 197 Fed. 415	3
Williams v. *State*, 130 Miss. 827, 94 So. 882	4

Statutes Cited

Cooley's Constitutional Limitations, Volume 2 (8th Ed. 1927), pp. 886, 1328	4
Judicial Code, Section 237(a), 28 U. S. C. 344(a) and 45 Stat. 54, 28 U. S. C. 861a and 861b	1
New York Penal Law, Section 1141, Subd. 1	2

BLEED THROUGH

POOR COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 539

DOUBLEDAY & COMPANY, INC.,
Defendant-Appellant,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Appellee

MOTION TO DISMISS OR AFFIRM

MAY IT PLEASE THE COURT:

Now comes appellee and moves that the appeal be dismissed, or in the alternative that the final judgments appealed from be affirmed.

Preliminary Statement

This is an appeal from final judgments of the Court of Special Sessions of the City of New York [Judicial Code, §237(a), 28 U. S. C., §344(a); and 45 Stat. 54, 28 U. S. C., §§ 861 a, 861 b], entered upon an order of the Court of Appeals (297 N. Y. 687) unanimously affirming without opinion an order of the Appellate Division of the Supreme Court (R. 83-4;[1] 272 App. Div. 799) which unanimously

---

[1] Unless otherwise indicated, references marked "R." are to pages in the record before the New York Court of Appeals. Those marked "p." or "pp." are to pages in People's Exhibit 1, *Memoirs of Hecate County.*

affirmed the original judgments of the Court of Special Sessions convicting defendant of the crimes of Publishing and Selling an Obscene Book (R. 59, 63; Perlman, J., dissenting at R. 76-8; New York Penal Law, §1141, subd. 1). This appeal was allowed by the Chief Judge of the Court of Appeals.

Introduction

Appellant, convicted of publishing an obscene book, *Memoirs of Hecate County* (Exh. 1), has never attacked the validity, on its face, of the statute under which the conviction was had. Its principal contention has been that the factual finding of obscenity contravened the constitutional guarantee of a free press (see R. 21, 55; *Assignment of Errors; Statement as to Jurisdiction*).

The Statute

Subdivision 1 of section 1141 of the New York Penal Law, the statute under which appellant was convicted, provides that any person shall be guilty of a misdemeanor who:

> "sells * * * any obscene, lewd, lascivious, filthy, indecent or disgusting book, magazine, pamphlet, newspaper, story paper, writing, paper, picture, drawing, photograph, figure or image, or any written or printed matter of an indecent character; * * * or who designs, copies, draws, photographs, prints, utters, publishes, or in any manner manufactures, or prepares any such book * * *."

The Book

The greater part of the book (Exh. 1) is devoted to a story entitled *The Princess with the Golden Hair* (pp. 82-239), which in turn is almost wholly comprised of descriptions of the hero's sexual activities. The principal plot deals with his seduction of one Imogen Loomis, a married woman (see pp. 189-94). A sub-plot relates to his sexual

POOR COPY
BLEED THROUGH

activities with another married woman, Anna Lenihan, whom he picked up in a dance hall (see pp. 106-10). The two plots are joined when gonorrhea, contracted from Anna, interferes with the hero's timetable of conquests in his affair with Imogen (pp. 124-5, 131-2, 139).

The story eschews moral judgment and concerns itself chiefly with techniques of seduction and descriptions of intercourse. More than fifteen assorted sexual acts are described or suggested (pp. 109-10, 110-1, 113, 114, 119-20, 122, 123, 153, 155, 159-60, 168, 189-91, 192, 194, 196, 207, 231). In addition the story contains three frustrated attempts at intercourse (pp. 98, 109, 183-4), designs, plans and stratagems to seduce the heroine (pp. 145-8), numerous anecdotes about sex and allied subjects, various filthy conversations (pp. 110, 111, 113, 114, 115, 118, 119, 120, 122, 123, 161, 187, 197-8, 231) and assorted reveries of intercourse (pp. 188, 214).

Point I

No Substantial Question Is Presented

The statute under which the conviction was had is a typical declaration of common law obscenity (see *The Statute, supra; Appendix, infra*), and its constitutionality on its face has never been attacked in this proceeding (*cf.* R. 21, 55; Appellant's *Statement as to Jurisdiction*). The factual finding that the book (Exh. 1) is obscene would be justified under any workable standard of obscenity that could be devised. It follows that no substantial constitutional question is presented [see *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 571-572; also, *Robertson* v. *Baldwin,* 165 U. S. 275, 281; *Tyomies Publishing Co.* v. *United States* (C. C. A. 6th 1914) 211 Fed. 385, 388; *United States* v. *Harmon* (D. Kans. 1891) 45 Fed. 414, 415-416, rev'd on other grounds 50 Fed. 921; *United States* v. *Journal Co.* (E. D. Va. 1912) 197 Fed. 415, 418;

Rebhuhn v. *Cahill* (S. D. N. Y. 1939) 31 Fed. Supp. 47, 49; *Williams* v. *State* (1923) 130 Miss. 827, 841-842, 94 So. 882, 883; 2 Cooley's *Constitutional Limitations* (8th ed. 1927) pp. 886, 1328].

As the Court declared in *Chaplinsky* v. *New Hampshire*, 315 U. S., at pp. 571-572:

> "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene • • •."

Conclusion

The contention that appellant's constitutional rights were violated by the instant finding of obscenity is insubstantial and foreclosed by previous decisions of the Court. The appeal should therefore be dismissed, or in the alternative the judgments appealed from should be affirmed.

Respectfully submitted,

FRANK S. HOGAN,
District Attorney, New York County.

WHITMAN KNAPP,
Assistant District Attorney,
Of Counsel.

January, 1948.

POOR COPY
BLEED THROUGH

APPENDIX

American Obscenity Statutes

Practically every American jurisdiction has a statute similar in effect to the one here involved. See *The Statute, supra; United States Code* (1940) tit. 18, §334; *id.*, tit. 19, §1305; *Ala.* Code Ann. (1940) tit. 14, §373; *Ariz.* Code Ann. (1939) §43-3002; *Ark.* Dig. Stat. (1937) §3381; *Cal.* Pen. Code (1941) §311, subd. 3; *Canal Zone* Code (1934) tit. 5, §451, subd. c; *Colo.* Stat. Ann. (1935) ch. 48, §217; *Conn.* Gen. Stat. (1930) §6244; *Del.* Rev. Code (1935) §2555; *D. C.* Code (1940) §22-2001; *Fla.* Stat. (1941) §847.01; *Ga.* Code Ann. (1933) §26-6301; *Guam Pen.* Code (1933) §311; *Hawaii* Rev. Laws (1945) §11107; *Idaho* Code Ann. (1932) §17-2101, subd. 3; *Ill.* Ann. Stat. (1935) ch. 38, §468; *Ind.* Ann. Stat. (Burns 1933) §10-2803; *Iowa* Code (1946) §725.4; *Kan.* Gen. Stat. Ann. (1935) §21-1101; *Ky.* Rev. Stat. (Cullen 1944) §436-100; *La.* Code Crim. Law & Proc. Ann. (1943), art. 740-106 (2); *Me.* Rev. Stat. (1944) ch. 121, §24; *Md.* Ann. Code Gen. Laws (1939) art. 27, §495; *Mass.* Ann. Laws (1933) ch. 272, §28; *Mich.* Comp. Laws (1929) §16829; *Minn.* Stat. Ann. (West 1945) §617.24; *Miss.* Code Ann. (1942) §2288; *Mo.* Rev. Stat. Ann. (1939) §§4660-4661; *Mont.* Rev. Code Ann. (1935) §11136, subds. 3, 4; *Neb.* Rev. Stat. (1943) §28-921; *Nev.* Comp. Laws Ann. (1929) §10144, subd. 1; *N. H.* Rev. Laws (1942) ch. 441, §14; *N. J.* Stat. Ann. (1939) §2-140-2; *N. M.* Stat. Ann. (1941) §14-1812 (local option); *N. C.* Gen. Stat. Ann. (1943) §14-189; *N. D.* Rev. Code (1943) §12-2109; *Ohio* Gen. Code Ann. (1939) §13035; *Okla.* Stat. (1941) tit. 21, §1021; *Ore.* Comp. Laws Ann. (1940) §23-924; *Pa.* Stat. Ann. (1945) tit. 18, §4524; *R. I.* Gen. Laws (1938) ch. 610, §13; *S. C.* Code Ann. (1942) §1443; *S. D.* Code (1939) §13.1722(3); *Tenn.* Code Ann. (Williams 1934) §11190; *Tex.* Pen. Code Ann. (1938) art. 526; *Utah* Code Ann. (1943) §15-8-41 (local option); *Vt.* Pub. Laws (1933) §8621; *Va.* Code Ann. (1942) §4549; *Wash.* Rev. Stat. Ann. (1932) §2549(1); *W. Va.* Code Ann. (1943) §6066; *Wis.* Stat. (1945) §351.38(1); *Wyo.* Comp. Stat. Ann. (1945) §9-513.

FILE COPY

Office - Supreme Court, U. S.
FILED
OCT 19 1948
CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM 1948

No. 11

DOUBLEDAY & COMPANY, INC.

Appellant

against

THE PEOPLE OF THE STATE OF NEW YORK

Appellee

APPELLEE'S BRIEF

FRANK S. HOGAN
District Attorney
New York County

WHITMAN KNAPP
Assistant District Attorney

WILLIAM HOPPEN
Deputy Assistant District Attorney

of counsel

BAR PRESS INC., 54 LAFAYETTE ST., NEW YORK 13 — WA. 5 3432 - 3

BLEED THROUGH

POOR COPY

SUBJECT INDEX

	PAGE
STATEMENT	1
INTRODUCTION	2
STATUTE	2
BOOK	3
TRIAL	7
OBSCENITY	8
POINT I. The judgment should be affirmed	11
a. Obscenity—Finding	11
b. Obscenity—Freedom of press	11
CONCLUSION	12
APPENDIX	13

Cases Cited

Chaplinsky v. New Hampshire, 315 U. S. 568	8, 11
Hadley v. State (1943) 205 Ark. 1027, 172 S. W. (2d) 237	10
Halsey v. New York Society for the Suppression of Vice (1922) 234 N. Y. 1, 136 N. E. 219	9, 10
Jackson, Ex parte, 96 U. S. 727	8
Lynch v. United States (C. C. A. 7th 1922) 285 Fed. 162	6
Near v. Minnesota, 283 U. S. 697	8

PAGE

Parmelee v. United States (1940) 72 App. D. C. 203, 113 Fed. (2d) 729 10
People v. Berg (2nd Dept. 1934) 241 App. Div. 543, 272 N. Y. Supp. 586 9
People v. Brainard (1st Dept. 1920) 192 App. Div. 816, 183 N. Y. Supp. 452 9
People v. Creative Age Press (Mag. Ct. Manhattan 1948) 79 N. Y. Supp. (2d) 198 9
People v. Gitter (Sup. Ct. N. Y. Co. 1929) 133 Misc. 693, 234 N. Y. Supp. 213 7
People v. Herk (Sup. Ct. N. Y. Co. 1942) 44 N. Y. Supp. (2d) 444 7
People ex rel Kahan v. Random House (Sup. Ct. N. Y. Co. 1947) 118 N. Y. L. J., p. 375, col. 3 7
People v. London (Mag. Ct. Manhattan 1946) 63 N. Y. Supp. (2d) 227 9
People v. Miller (Mag. Ct. Manhattan 1935) 155 Misc. 446, 279 N. Y. Supp. 583 9
People v. Morganstern (Sup. Ct. N. Y. Co. 1927) 134 Misc. 127, 234 N. Y. Supp. 211 7
People v. Pesky (1st Dept. 1930) 230 App. Div. 200, 243 N. Y. Supp. 193, aff'd 254 N. Y. 373, 173 N. E. 227 ..... 9, 10
People v. Price (Gen. Sess. N. Y. Co. 1944) 53 N. Y. Supp. (2d) 47 7
People v. Viking Press, Inc. (Mag. Ct. Manhattan 1933) 147 Misc. 813, 264 N. Y. Supp. 534 9
People v. Wepplo (1947) 78 Cal. App. (2d) 959, 178 Pac. (2d) 853 ..... 10, 11

Rebhuhn v. Cahill (S. D. N. Y. 1939) 31 Fed. Supp. 47 8
Robertson v. Baldwin, 165 U. S. 275 8

St. Hubert Guild v. Quinn (Sup. Ct. 1909) 64 Misc. 336, 118 N. Y. Supp. 582 9
State v. Van Wye (1896) 136 Mo. 227, 37 S. W. 938 8

POOR COPY

BLEED THROUGH

PAGE

Tyomies Publishing Co. v. United States (C. C. A. 6th 1914) 211 Fed. 385 8

United States v. Dennett (C. C. A. 2nd 1930) 39 Fed. (2d) 564 8
United States v. Journal Co. (E. D. Va. 1912) 197 Fed. 415 8
United States v. Kennerley (S. D. N. Y. 1913) 209 Fed. 119 10
United States v. Levine (C. C. A. 2nd 1936) 83 Fed. (2d) 156 10
United States v. One Book Entitled Ulysses (C. C. A. 2nd 1934) 72 Fed. (2d) 705 9
United States v. One Obscene Book Entitled "Married Love" (S. D. N. Y. 1931) 48 Fed. (2d) 821 8

Williams v. State (1923) 130 Miss. 827, 94 So. 882 8
Winters v. New York, 333 U. S. 507 ..... 8, 11
Worthington Co., In re (Sup. Ct. N. Y. Co. 1894) 30 N. Y. Supp. 361 9

Statutes

Alabama Code Ann. (1940) tit. 14, § 373 14
Arizona Code Ann. (1939) §43-3002 14
Arkansas Dig. Stat. (1937) §§3381, 3382 15

California Pen. Code (1941) §311 15
Canal Zone Code (1934) tit. 5, §451 15
Colorado Stat. Ann. (Supp. 1947) c. 48, §§216, 217 16
Connecticut Gen. Stat. (1930) §6244 16

Delaware Laws (1941) c. 239, §5280A 16
District of Columbia Code (1940) §22-2001 17

Florida Stat. (1941) §847.01 17

PAGE

Georgia Code Ann. (Supp. 1947) §26-6301 18
Guam Pen. Code (1933) §311 18

Hawaii Rev. Laws (1945) §§11107, 11109 19

Idaho Code Ann. (1932) §17-2101 19
Illinois Rev. Stat. (1947) c. 38, §468 19
Indiana Ann. Stat. (Burns 1933) §10-2803 20
Iowa Code (1946) §725.4 20

Kansas Gen. Stat. Ann. (1935) §21-1102 21
id., (Cum. Supp. 1945) §21-1115 21
Kentucky Rev. Stat. (1946) §436.100 21

Louisiana Code Crim. Law & Proc. Ann. (1943) §740-106 22

Maine Rev. Stat. (1944) c. 121, §24 22
Maryland Ann. Code Gen. Laws (1939) art. 27, §495 22
Massachusetts Ann. Laws (Supp. 1947) c. 272, §§28, 28B 23
Michigan Comp. Laws (1929) §16829 24
Minnesota Stat. (Henderson 1945) §617.24 24
Mississippi Code Ann. (1942) §2288 25
Missouri Rev. Stat. (1939) §4660 25
Montana Rev. Codes Ann. (1935) §11136 25

Nebraska Rev. Stat. (1943) §28-921 26
Nevada Comp. Laws Ann. (1929) §10144 26
New Hampshire Rev. Laws (1942) c. 441, §14 26
New Hampshire Laws (1947) c. 73, §17 26
New Jersey Rev. Stat. (1937) §2:140-2 27
New Mexico Stat. Ann (1941) §§14-1803, 14-1812 27
New York Penal Law §1141 ..... 1-2, 27-28
North Carolina Gen. Stat. Ann. (1943) §§14-189, 14-194 28
North Dakota Rev. Code (1943) §12-2109 29

POOR COPY

BLEED THROUGH

PAGE

Ohio Gen. Code Ann. (Supp. 1947) §13035 29
Oklahoma Stat. (1941) tit. 21, §1021 30
Oregon Comp. Laws Ann. (1940) §23-924 30

Pennsylvania Stat. Ann. (1945) tit. 18, §4524 30
Puerto Rico Pen. Code (1937) §283 31

Rhode Island Gen. Laws (1938) c. 610, §13 31

South Carolina Code Ann. (1942) §1443 32
South Dakota Code (1939) §13.1722 32

Tennessee Code Ann. (Williams 1934) §11190 32
Texas Pen. Code Ann. (1938) art. 526 33

United States Code (1946) tit. 18, §334 13
id., tit. 19, §1305 14
Utah Code Ann. (1943) §§15-8-1, 15-8-41 33

Vermont Pub. Laws (1933) §8621 33
Virginia Code Ann. (1942) §4549 33

Washington Rev. Stat. Ann. (1932) §2459 34
West Virginia Code Ann. (1943) §6066 34
Wisconsin Stat. (1947) §351.38 34
Wyoming Comp. Stat. Ann. (1945) §9-513 35

Authorities

2 Cooley's Constitutional Limitations (8th ed. 1927) pp. 886, 1328 8

BLEED THROUGH

POOR COPY

Supreme Court of the United States

OCTOBER TERM 1948

No. 11

DOUBLEDAY & COMPANY, INC.
Appellant

against

THE PEOPLE OF THE STATE OF NEW YORK
Appellee

APPELLEE'S BRIEF

Statement

This is an appeal from a final judgment of the New York Court of Appeals [R 60-1*; 297 N. Y. 687, 77 N. E. (2d) 6] unanimously affirming without opinion an order of the Appellate Division [R 50; 272 App. Div. 799, 71 N. Y. Supp. (2d) 736], which similarly affirmed without opinion the original judgments of the Court of Special Sessions of the City of New York convicting appellant of PUBLISHING and of SELLING an OBSCENE BOOK (R 41-2, 44-5; PERLMAN, J., dissenting in opinion at R 42, 47-8; New

* "R" indicates a page reference to the record.

York Penal Law §1141, subd. 1). This appeal was allowed by the Chief Judge of the Court of Appeals (R 61-2). On March 15, 1948 the Court noted probable jurisdiction (R 67; 68 Sup. Ct. 732).

Introduction

The conviction rests upon a finding that appellant's book (Exh. 1) is obscene. The only claim which appellant here raises is that because of the free press guarantee the trial court was not justified in that finding (see brief, pp. 2-52).

Statute

Subdivision 1 of section 1141 of the New York Penal Law (see Appendix, *infra*, pp. 27-28), the statute under which appellant was convicted, provides that a person shall be guilty of a misdemeanor who

> "sells * * * any obscene, lewd, lascivious, filthy, indecent or disgusting book, * * * or who * * * publishes * * * such book * * *."

BLEED THROUGH

POOR COPY

Book

The book was published by appellant corporation on March 7, 1946, and advertised for commercial distribution (R 18-19; Exhs. B, B1, B2, B3, B4). Its principal story, taking up about one-half of the whole, is a fictional account of events taking place around 1929 in New York City and in a nearby imaginary county, related by the author in the first person (82-239*; compare 1-81, 240-338; see R 33, 34). The main plot deals with Imogen, an apparently happily-married suburbanite whom the author, in a tale of "charming gallantry" (R 36), pursues and ultimately seduces (82, 188-93; *infra*, pp. 4-5). A subsidiary plot, made intentionally vulgar by "contrast" (R 36), concerns Anna, a Brooklyn taxi-dancer, married but separated, whom the author picks up and with whom throughout the story he engages in numerous acts of intercourse (106-7, 111-2; *infra*, pp. 4-5). These plots are joined when venereal disease, caught from Anna, impedes the author's pursuit of Imogen (124; *infra*, pp. 4-5). Finished with both, the author ultimately returns to a prior sex relation with his "regular girl," a divorced woman with two children (82, 230-2; *infra*, pp. 4-5). Interspersing them with discourses on economic philosophy, personal reflections and other matters, the author describes or suggests more than fifteen assorted sex acts (109-10, 110-1, 119-20, 122, 123, 153, 155, 159-60, 168, 189-91, 192, 194, 196, 207, 231), three frustrated attempts (98, 109, 183-4), numerous sex anecdotes, filthy conversations and other obscenities (110, 111, 113, 114, 115, 118, 119, 120, 122, 123, 161, 187, 188, 197-8, 214, 231; *infra*, pp. 4-5).

* All otherwise undesignated references are to pages in the book (Exh. 1).

The author describes how he first noticed Imogen's charms on a summer evening, after his "regular girl" left him for California (82-4; see 104). During the next months the author pursues Imogen and indulges in various lascivious thoughts about her body and prospective seduction (84-8, 94-100, 101, 103; see 131). In January she goes south (104) and the author turns to dime-a-dance halls, where he picks up Anna (105-7). The author takes her up to his room, and during the next few months engages with her in various forms of amatory play and intercourse (107-10, 111, 113, 114, 115, 119-20, 122, 123), which he carefully records in a diary (110). Anna tells him, among other things, about men's sex reactions to her bare skin (110), her husband's marital and extra-marital intercourse (112, 114, 120), her need for sex gratification (113), dreams and observations about intercourse (112-3, 114, 120), premarital pregnancy (118), later abortion (121), her sister's youthful sex profligacy (186), her mother's fat paramour and his combination speakeasy and whorehouse (111, 117, 123, 185, 228), details of sex perversion (161; see 163, 180), dance hall "greaseballs" and "pigs" and their orgasms (122), a boarder and his excrement (187) and other obscenities (180, 185).

In mid-April Anna leaves the author to visit her sick husband (124); Imogen returns to the scene, and the author discovers that he has gonorrhea (124-5). After he cures this (see 139), the author decides that he must steal Imogen from her husband (144-5), but resolves first to dominate her by intercourse (145). He sees her and asks her to have it with him (145-7; also 138-9), but she

POOR COPY

BLEED THROUGH

refuses because of a supposed spinal disease (147-9; see 209-10). The author again sees Anna (150-1), reproaches her for his gonorrhea (151; see 124-5), and on a number of occasions engages with her in intercourse (153, 155, 159-60, 168; see 166). In June the author renews his pleas to Imogen (183-4), and she consents (184). On the morning of assignation the author has a reverie about her body and his subduing her in intercourse (188). Imogen arrives that afternoon and they undress, go to bed, engage in various amatory exercises and in intercourse (188-91). They rest, and again have intercourse (191-2). The author describes the woman's breasts and thighs (189-90) and the functioning of his and her sex organs (190-1) in a climactic passage of obscenity (189-91).

That evening the author again sees Anna, and engages with her in the day's third act of intercourse (194). The next week the author again has Imogen (196), quarrels with her and parts (196-7, 200-2; see 218-23, 225), and thereafter has a vision of her nude breasts (206). The author turns to another girl whom, in a brief episode, he seduces (207) and thereafter avoids (207-8, 229-30). He arranges for an operation upon Anna (212-3), visits her (213-4), and comes home and reflects on her body and sex organs (214). The author is "rescued" by the return of his regular girl (230-1; see 82), who immediately falls in bed with him (231). At story's end the author, having returned to suburbia and effectively discarded Anna (see 204-5, 232-3, 239), learns that she has decided to marry another (234-5), and tells of his regrets at the termination of their sex relations (238-9). The author again describes thighs, breasts, sex organs and acts in assorted passages of indecency and obscenity (196, 206, 207, 214, 231).

The rest of the book, laid in the same general locale, is made up of five other stories (1-81, 240-338). Three, patently innocuous, are reprinted from various periodicals and inserted in front of the principal one (1-13, 14-54, 55-81; see *Acknowledgments*, front Exh. 1; R 32-3, 34). Aside from the author, who again speaks in the first person, they contain no character in common with the main story, and their plots are similarly unrelated (R 32-3; compare 1-13, 14-54, 55-81 with 82-239). The other two, inserted after the principal one, are also unrelated to it in plot and character (compare 240-97, 298-338 with 82-239), except that in one of them the author brings his "regular girl" into a dream passage of intercourse, describing legs, body and sex organ in a final passage of obscenity (329-30; see 82, 336). In the other story the author, interspersing assorted sex-laden topics (248, 252, 254-6, 272-4, 278), discusses the New York publishing business' literary trash, its methods of advertising and distribution, corruption of artists, pandering to public taste (240-97), and a lascivious climax for a proposed best seller (290; see 288-90).

The book evoked much critical comment, and in appellant's brief are set forth a number of reviews of favorable nature (appendix 1-36). All of them mention the book's passages of sex (*id.*, Quarterly Book List 3, Poore 4, Match 10, Time 11, Smith 15-16, De Jong 20, Cowley 24, Richmond 28, Kazin 33). Some recognize its cluttered and tasteless style (*id.*, Poore 4, Kazin 36) and failure to sustain interest (*id.*, Cowley 24). One of them notes its position on the list of best sellers and says that other critics—unquoted by appellant—ascribe its place there to the pornographic passages [*id.*, De Jong 21; *cf.* Time 11, 12; *Lynch* v. *United States* (C. C. A. 7th 1922) 285 Fed. 162, 163].

BLEED THROUGH POOR COPY

Trial

Appellant not having requested trial by jury [*cf. e.g.*, *People ex rel. Kahan* v. *Random House* (Sup. Ct. N. Y. Co. 1947) 118 N. Y. L. J., p. 375, col. 3; *People* v. *Herk* (Sup. Ct. N. Y. Co. 1942) 44 N. Y. Supp. (2d) 444, 446-447; *People* v. *Price* (Gen. Sess. N. Y. Co. 1944) 53 N. Y. Supp. (2d) 47, 49; *People* v. *Gitter* (Sup. Ct. N. Y. Co. 1929) 133 Misc. 693, 694, 234 N. Y. Supp. 213, 213-214; *People* v. *Morganstern* (Sup. Ct. N. Y. Co. 1927) 134 Misc. 127, 128, 234 N. Y. Supp. 211, 212], the case was heard by three judges sitting as triers both of law and of fact (see New York City Crim. Cts. Act §31, subd. 4; and §34). The trial court ruled that the book was to be considered as a whole (R 12-4, 16, 38; Exh. 1; see R 21, 22, 31) and, subject to briefing as to materiality (R 20-1; see R 27, 31), received evidence of author and publisher reputation (R 16-8, 27-3), of publication methods (R 18-9; Exhs. B, B1, B2, B3, B4) and of literary merit (R 25-38; see Obscenity, *infra*, p. 9; *cf.* appellant's brief, p. 25).

Obscenity

In *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 571-572, a prosecution for use of offensive words, in discussing certain recognized exceptions to the guarantee of free speech, the Court pointed out that punishment of the obscene raised no constitutional problem [see also *Ex parte Jackson,* 96 U. S. 727, 736; *Robertson* v. *Baldwin,* 165 U. S. 275, 281; *Near* v. *Minnesota,* 283 U. S. 697, 716; *Winters* v. *New York,* 333 U. S. 507, 515, 520; *United States* v. *Dennett* (C. C. A. 2nd 1930) 39 Fed. (2d) 564, 569; *Tyomies Publishing Co.* v. *United States* (C. C. A. 6th 1914) 211 Fed. 385, 388; *Rebhuhn* v. *Cahill* (S. D. N. Y. 1939) 31 Fed. Supp. 47, 49; *United States* v. *One Obscene Book Entitled "Married Love"* (S. D. N. Y. 1931) 48 Fed. (2d) 821, 822; *United States* v. *Journal Co.* (E. D. Va. 1912) 197 Fed. 415, 418; *Williams* v. *State* (1923) 130 Miss. 827, 841, 842, 94 So. 882, 883; *State* v. *Van Wye* (1896) 136 Mo. 227, 233-236, 37 S. W. 938, 939-940; 2 Cooley's *Constitutional Limitations* (8th ed. 1927) pp. 886, 1328].

In *Winters* v. *New York,* 333 U. S. 507, 511, 520, in striking down as too uncertain a provision dealing with stories of "bloodshed, lust or crime," the Court referred by way of contrast to the undoubted propriety of the instant statute (see also Appendix, *infra,* pp. 13-35).

BLEED THROUGH POOR COPY

In *Halsey* v. *New York Society for the Suppression of Vice* (1922) 234 N. Y. 1, 3-6, 136 N. E. 219, 220-221, a suit for malicious prosecution under the instant statute, the New York Court of Appeals held that a book must be considered as a whole, and took into account literary merit, manner of publication, and sincerity of motive [see *People* v. *Berg* (2nd Dept. 1934) 241 App. Div. 543, 544, 545, 272 N. Y. Supp. 586, 587-588, aff'd 269 N. Y. 514, 199 N. E. 513; *People* v. *Pesky* (1st Dept. 1930) 230 App. Div. 200, 203-204, 243 N. Y. Supp. 193, 196-198, aff'd 254 N. Y. 373, 173 N. E. 227; *People* v. *Brainard* (1st Dept. 1920) 192 App. Div. 816, 820-821, 183 N. Y. Supp. 452, 455-456; *St. Hubert Guild* v. *Quinn* (Sup. Ct. 1909) 64 Misc. 336, 338-342, 118 N. Y. Supp. 582, 583-586; *In re Worthington Co.* (Sup. Ct. N. Y. Co. 1894) 30 N. Y. Supp. 361, 362-363; *People* v. *Creative Age Press* (Mag. Ct. Manhattan 1948) 79 N. Y. Supp. (2d) 198, 200-201; *People* v. *London* (Mag. Ct. Manhattan 1946) 63 N. Y. Supp. (2d) 227, 230-231; *People* v. *Miller* (Mag. Ct. Manhattan 1935) 155 Misc. 446, 446-448, 279 N. Y. Supp. 583, 584-585; *People* v. *Viking Press, Inc.* (Mag. Ct. Manhattan 1933) 147 Misc. 813, 813-817, 264 N. Y. Supp. 534, 536-539; *cf. United States* v. *One Book Entitled Ulysses* (C. C. A. 2nd 1934) 72 Fed. (2d) 705, 706-709; Trial, *supra*, p. 7; appellant's brief, p. 25].

In *United States* v. *Levine* (C. C. A. 2nd 1936) 83 Fed. (2d) 156, 157, following the New York rule in its statement of relevant factors, the court declared that a trial finding of obscenity constituted an expression of community morality of which the triers of fact were ultimate arbiters [see also *Parmelee* v. *United States* (1940) 72 App. D. C. 203, 205-206, 113 Fed. (2d) 729, 731-732; dissent 72 App. D. C. at 214-216, 113 Fed. (2d) at 740-742; *United States* v. *Kennerley* (S. D. N. Y. 1913) 209 Fed. 119, 121; *Hadley* v. *State* (1943) 205 Ark. 1027, 1030, 172 S. W. (2d) 237, 239; *People* v. *Wepplo* (1947) 78 Cal. App. (2d) 959, 961, 178 Pac. (2d) 853, 855; *People* v. *Pesky* (1930) 254 N. Y. 373, 373-374, 173 N. E. 227; *Halsey* v. *New York Society for the Suppression of Vice* (1922) 234 N. Y. 1, 6, 7, 136 N. E. 219, 220, 221].

POOR COPY

BLEED THROUGH

POINT I

The judgment should be affirmed.

a. Obscenity—Finding. Appellant claims that the trial court improperly found the book obscene (brief pp. 3, 4-12). This is without merit. The record justifies the finding of obscenity [109-10, 119-20, 122, 159-60, 183-4, 187, 189-91, 192, 194, 196, 207, 231, 329-30; Exh. 1, *passim*; Book, *supra*, pp. 3-6; see Trial, *supra*, p. 7; Obscenity, *supra*, p. 9; also *People* v. *Wepplo* (1947) 78 Cal. App. (2d) 959, 961-962, 178 Pac. (2d) 853, 855-856 (same book)].

b. Obscenity—Freedom of press. Appellant further contends that the finding violates freedom of the press (brief, pp. 2-4, 12-52). This is likewise groundless. The finding, justifiably made under valid statute, raises no constitutional problem [*Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571-572; *Winters* v. *New York*, 333 U. S. 507, 511, 520; Obscenity, *supra*, p. 8].

The judgment should be affirmed.

Respectfully submitted,

FRANK S. HOGAN
District Attorney
New York County

WHITMAN KNAPP
Assistant District Attorney

WILLIAM HOPPEN
Deputy Assistant District Attorney
of counsel

October 1948

POOR COPY

BLEED THROUGH

APPENDIX

Obscenity Statutes

This is a compilation of relevant portions of available obscenity statutes of all American jurisdictions, including the federal, and those of the forty-eight states.

UNITED STATES Code (1946) tit. 18

§334 • • • *Mailing obscene matter.* Every obscene, lewd, or lascivious, and every filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, and every article or thing designed, adapted or intended • • • for any indecent or immoral use; and every article, • • • or thing which is advertised or described in a manner calculated to lead another to use or apply it • • • for any indecent or immoral purpose; and every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of the hereinbefore-mentioned matters, articles, or things may be obtained or made, • • • whether sealed or unsealed; and every letter, packet, or package, or other mail matter containing any filthy, vile, or indecent thing, device, or substance; and every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can, be used or applied for • • • any indecent or immoral purpose; and every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing, is hereby declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier. Whoever shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be nonmailable, or shall knowingly take, or cause the same to be taken, from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000, or imprisoned not more than five years, or both. • • •

id., tit. 19

§*1305. Immoral articles; importation prohibited—Prohibition of importation*

(a) All persons are prohibited from importing into the United States from any foreign country any * * * obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral * * *. No such articles, whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles and, unless it appears to the satisfaction of the collector that the obscene or other prohibited articles contained in the package were inclosed therein without the knowledge or consent of the importer, owner, agent, or consignee, the entire contents of the package in which such articles are contained, shall be subject to seizure and forfeiture as hereinafter provided: * * * *Provided* * * *, That the Secretary of the Treasury may, in his discretion, admit the so-called classics or books of recognized and established literary or scientific merit, but may, in his discretion, admit such classics or books only when imported for noncommercial purposes.

ALABAMA Code Ann. (1940) tit. 14

§*373.* * * * *obscene literature.*—Any person who brings, or causes to be brought into this state for sale, or advertises, or prints, or sells, or offers to sell, or receives subscription for any indecent or obscene book, pamphlet, print, picture, or paper, shall, on conviction, be fined not less than fifty nor more than one thousand dollars.

ARIZONA Code Ann. (1939)

43-3002. * * * Every person * * * who writes, composes, prints, publishes, sells, distributes, keeps for sale, gives, loans or exhibits any obscene or indecent writing, paper, or book to any person, * * * is guilty of a misdemeanor.

POOR COPY

BLEED THROUGH

ARKANSAS Dig. Stat. (1937)

§3381. *Sale or circulation.* Hereafter it shall be unlawful for any person, firm or corporation to sell or to offer for sale, or to have in possession, any magazine, paper, or other literature or printed book, picture, or matter, the shipment or transportation of which has been refused and rejected from the United States mails, or which literature, or literature of like character, the Government of the United States will not permit to be sold, shipped or handled.

§3382. *Punishment.* Any violation of the provisions of this Act shall constitute a misdemeanor and, upon conviction, shall subject the offender to a fine of any sum not less than Fifty Dollars nor more than One Hundred Dollars, and each day that this Act shall be violated shall constitute a separate offense. • • •.

CALIFORNIA Pen. Code (1941)

§311. [• • • *Obscene* • • • *writings* • • •.] Every person who willfully and lewdly • • •

• • •

3. Writes, composes, stereotypes, prints, publishes, sells, distributes, keeps for sale, or exhibits any obscene or indecent writing, paper, or book • • •

• • • is guilty of a misdemeanor.

CANAL ZONE Code (1934) tit. 5

451. • • • Every person who willfully and lewdly • • •

• • •

• • • Writes, composes, stereotypes, prints, publishes, sells, distributes, keeps for sale or exhibits any obscene or indecent writing, publications or books • • •

• • • is guilty of a misdemeanor.

COLORADO Stat. Ann. (Supp. 1947) c. 48

§216. *Importing obscene books* • • • *Penalty.*— If any person shall hereafter bring or cause to be brought or imported into this state for sale, or shall sell or offer to sell any obscene book, pamphlet or print, every such person shall, on conviction, be fined not less than $100.00 nor more than $2,000.00 and imprisoned in the county jail for not less than one month, nor more than one year.

§217. *Penalty for exhibiting or selling obscene books.*— Whoever exhibits, lends, gives away, sells, or offers to exhibit, lend, give away, or sell; or in any manner publishes, or offers to publish, or has in his possession, for any such purpose, any obscene, lewd, or indecent, or lascivious book, pamphlet, paper, drawing, print, picture, writing, advertisement, circular, or other representation, figure or image on, or of paper, or other material, • • • shall be guilty of a misdemeanor, and, on conviction thereof, shall be fined not less than one hundred dollars ($100.00) nor more than two thousand dollars ($2,000.00) with costs of court, or imprisoned in the county jail for not less than one month, nor more than one year • • •.

CONNECTICUT Gen. Stat. (1930)

Sec. 6244. Obscene literature • • •. Any person who shall buy, sell, advertise, lend, give, offer or show, any book, pamphlet, paper or other thing containing obscene, indecent or impure language, or any picture, print, drawing, figure, image or other engraved, printed or written matter of like character, • • • or shall design, copy, draw, photograph, print, etch, engrave, cut, carve, make, utter, publish or otherwise prepare, or assist in preparing, anything herein named, shall be imprisoned not more than two years or be fined not more than one thousand dollars or both.

DELAWARE Laws (1941) c. 239

5280 A. • • •. Whoever sells, lends, distributes, exhibits, gives away or shows, or offers to sell, lend, distribute, exhibit, give away or show, or has in his possession with intent to sell, lend, distribute, exhibit, give away or show, or knowingly advertises in any manner whatsoever,

POOR COPY

BLEED THROUGH

any obscene, lewd, lascivious, filthy, indecent book, magazine, pamphlet, newspaper, story-paper, paper, writing, drawing, photograph, film, figure or image, or any written or printed matter of an indecent, obscene, lewd, lascivious, filthy nature, * * * or whoever designs, copies, draws, photographs, prints, shows, utters, publishes or in any manner manufactures, produces or prepares any obscene, lewd, lascivious, filthy or indecent book, magazine, pamphlet, newspaper, story-paper, paper, writing, drawing, photograph, film, figure or image, * * * is guilty of a misdemeanor, and upon conviction shall be sentenced to pay a fine of not less than $250.00, nor more than $2,500.00, or imprisoned for a term of not less than thirty days, nor more than three years, or by both such fine and imprisonment.

DISTRICT OF COLUMBIA Code (1940)

*§22-2001 * * * Definition and penalty.*

Whoever sells, or offers to sell, or give away, in the District, or has in his possession with intent to sell or give away or to exhibit to another, any obscene, lewd, or indecent book, pamphlet, drawing, engraving, picture, photograph, instrument, or article of indecent or immoral use, * * * shall be fined not less than fifty dollars nor more than five hundred dollars, or imprisoned not more than one year, or both. * * *

FLORIDA Stat. (1941)

847.01. Punishment for publishing and distributing obscene literature.

Whoever imports, prints, publishes, exhibits, displays, sells or distributes any book, pamphlet, ballad, printed paper, stereopticon, moving picture, slide or film, or other thing, containing obscene language or any obscene prints, figures, pictures or descriptions manifestly tending to the corruption of the morals of youth, or introduces into any family, school or place of education, or buys, procures, receives or has in his possession any book, pamphlet, ballad, printed paper, stereopticon slide or moving picture

film, or other thing, either for the purpose of sale, exhibition, loan or circulation, or with the intent to introduce the same into any family, school, or place of education, shall be punished by imprisonment in the state prison, not exceeding five years, or in the county jail not exceeding one year, or by fine not exceeding one hundred dollars.

GEORGIA Code Ann. (Supp. 1947)

26-6301 • • • *Sale, etc., of obscene pictures, books, etc.*—Any person who shall bring, or cause to be brought, into this State for sale or exhibition, or shall sell or offer to sell, or shall lend or give away or offer to lend or give away, or who shall possess or having possession thereof, shall knowingly exhibit to another any indecent pictorial newspaper tending to debauch the morals, or any indecent or obscene book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, and principally made up of pictures or stories of deeds of lust, • • • or shall manufacture, draw, or print any of said articles, with intent to sell or expose or circulate the same, shall, upon conviction, be punished by confinement and labor in the penitentiary for not less than one nor more than five years. However, upon the recommendation of the jury, said offense may be punished as a misdemeanor.

GUAM Pen. Code (1933)

311. • • • Every person who willfully and lewdly • • •

• • •

• • • Writes, composes, stereotypes, prints, publishes, sells, distributes, keeps for sale, or exhibits any obscene or indecent writing, paper, or book • • •

• • •

Is guilty of felony and shall be fined not more than two thousand dollars, or imprisoned not more than five years, or both.

POOR COPY

BLEED THROUGH

HAWAII Rev. Laws (1945)

Sec. 11107. Obscene and other prohibited publications. The importing, printing, publishing, selling, offering for sale, putting into circulation, distributing, lending, exhibiting publicly, or introducing into any family, school or place of education, any book, magazine, pamphlet, newspaper, story-paper, writing, paper, picture, drawing, print, photograph, lithograph, engraving, daguerreotype, stereoscopic picture, figure, description or representation, or written or printed matter of any sort which is obscene, lewd, lascivious, filthy, indecent or disgusting, • • • which manifestly tends to the corruption of the morals of youth, or of morals generally; or buying, procuring, receiving, or having in possession, any of the foregoing, with intent to sell, circulate, distribute, lend or exhibit the same, or to introduce the same into any family, school or place of education • • •

• • •

Sec. 11109. Penalty. • • • shall be punished by a fine not exceeding five hundred dollars or by imprisonment for not more than six months • • •.

IDAHO Code Ann. (1932)

17-2101. • • • *obscenity.*—Every person who wilfully and lewdly • • •

• • •

3. Writes, composes, stereotypes, prints, publishes, sells, distributes, keeps for sale, or exhibits, any obscene or indecent writing, paper, or book • • •

• • •

Is guilty of a misdemeanor.

ILLINOIS Rev. Stat. (1947) c. 38

468. Circulating. • • • Whoever brings, or causes to be brought into this state, for sale or exhibition, or shall sell or offer to sell, or shall give away or offer to give away, or have in his possession, with or without intent to sell or give away, any obscene and indecent book, pamphlet, paper, drawing, lithograph, engraving, daguerreotype, photograph, stereoscopic picture, model, cast, instru-

ment or article of indecent or immoral use, * * * shall be confined in the county jail not more than six months, or be fined not less than $100 nor more than $1,000 for each offense * * *.

INDIANA Ann. Stat. (Burns 1933)

10-2803 * * * *Obscene literature* * * * *Circulation, possession, manufacture.*—Whoever sells or lends, or offers to sell or lend, or gives away, or offers to give away, or in any manner exhibits, or has in his possession, with or without intent to sell, lend or give away, any obscene, lewd, indecent or lascivious book, pamphlet, paper, drawing, lithograph, engraving, picture, daguerreotype, photograph, stereoscopic picture, model, cast, instrument or article of indecent or immoral use, * * * or whoever manufactures, or draws and exposes, or draws with intent to sell or have sold, or prints any such articles or things, shall be fined not less than ten dollars [$10.00] nor more than five hundred dollars [$500], to which may be added imprisonment in the county jail not less than ten [10] days nor more than six [6] months * * *.

IOWA Code (1946)

725.4 Obscene books * * * *printing or distributing.* If any person import, print, publish, sell, or distribute any book, pamphlet, ballad, or any printed or written paper containing obscene language or obscene prints, pictures, or descriptions, manifestly tending to corrupt the morals of youth; or introduce into any family, school, or place of education, or buy, procure, receive, or have in his possession any such book, pamphlet, ballad, printed or written paper, picture, or description, either for the purpose of loan, sale, exhibition, or circulation, or with intent to introduce the same into any family, school, or place of education, he shall be imprisoned in the penetentiary not more than one year, or be fined not exceeding one thousand dollars.

POOR COPY

BLEED THROUGH

KANSAS Gen. Stat. Ann. (1935)

21-1102. Dealing in obscene literature; penalty. Every person or persons who shall bring or cause to be brought into the state, or shall buy, sell or cause to be sold, or shall advertise, lend, give away, offer, show, exhibit, or shall have in his possession with the intent to sell, lend, give away, offer, show, exhibit, distribute or cause to be distributed, or shall design, copy, draw, photograph, print, etch, or engrave, cut, carve, make, publish, or otherwise prepare or assist in preparing, or shall receive subscriptions for any indecent or obscene book, pamphlet, paper, picture, print, drawing, figure, image, or other engraved, printed or written matter, * * * shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than five nor more than three hundred dollars, or be imprisoned not to exceed thirty days, or both.

* * *

id., **(Cum. Supp. 1945)**

21-1115. Periodicals, magazines and other publications tending to debase or corrupt morals; when unlawful. It shall be unlawful to introduce into commerce, transport for the purpose of sale, sell, offer for sale, edit, publish, circulate, disseminate, or have in possession for sale or gratuitous distribution, expose for sale, or to distribute any magazine, periodical, or other publication published at regular intervals, which is not admissible to the United States mails, or which contains any cruel, indecent, or immoral matter, or other matter which tends to debase or corrupt morals.

KENTUCKY Rev. Stat. (1946)

436.100 * * * *Distribution of obscene literature.* Any person who sells, lends, gives away or shows, offers to sell, lend, give away or show, has in his possession with intent to sell, lend, give away or show, or advertises in any manner or otherwise offers for sale, loan, gift or distribution any obscene or disgusting book, magazine, pamphlet, newspaper, writing, picture, drawing, photograph, figure or image, or any written or printed matter of an indecent character, or who designs, copies, draws, photographs, prints, utters, publishes or in any manner manu-

factures or prepares any such matter or article, * * * shall be fined not less than fifty dollars nor more than one thousand dollars, or imprisoned for not less than ten days nor more than one year, or both.

LOUISIANA Code Crim. Law & Proc. Ann. (1943)

740-106. Obscenity.—Obscenity is the intentional:

* * *

(2) Production, sale, exhibition, possession with the intent to display, or advertisement of any indecent print, picture, written composition, model or instrument * * *

* * *

Whoever commits the crime of obscenity shall be fined not more than three hundred dollars, or imprisoned for not more than one year, or both.

MAINE Rev. Stat. (1944) c. 121

*Sec. 24. Making or circulating obscene books * * * penalty* * * * Whoever imports, prints, publishes, sells, or distributes any book, pamphlet, ballad, printed paper, or other thing containing obscene, indecent, or impure language, or manifestly tending to the corruption of the morals of youth, or an obscene, indecent, or impure print, picture, figure, or description, manifestly tending to the corruption of the morals of youth, or introduces into a family, school, or place of education, or buys, procures, receives, or has in his possession any such book, pamphlet, ballad, printed paper, or other thing, either for the purpose of sale, exhibition, loan, or circulation, or with intent to introduce the same into a family, school, or place of education, shall be punished by a fine of not less than $100, nor more than $1,000, and by imprisonment for not more than 5 years.

MARYLAND Ann. Code Gen. Laws (1939) art. 27

495. If any person shall bring or cause to be brought into this State for sale or exhibition, or shall sell, lend, give away or offer to give away, or show or have in his or her possession with intent to sell or give away, or to exhibit, show, advertise or otherwise offer for loan, gift, sale

POOR COPY

BLEED THROUGH

or distribution any lewd, obscene or indecent book, magazine, pamphlet, newspaper, story paper, writing paper, picture, card, drawing or photograph, * * * or shall design, copy, draw, photograph, print, utter, publish or prepare such book, picture, card, drawing, paper or other article, * * * [he] shall in every such case be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not exceeding two hundred dollars or shall be imprisoned not exceeding one year, or be both fined and imprisoned in the discretion of the court * * *.

MASSACHUSETTS Ann. Laws (Supp. 1947) c. 272

§28. *Sale, etc., of Obscene Literature, etc., to Person under Eighteen Years of Age; Introducing Same into a Family, School or Place of Education.*—Whoever sells or distributes, or imports, prints or publishes for the purpose of selling or distributing, to a person under the age of eighteen years a book, pamphlet, ballad, printed paper, phonographic record or other thing which is obscene, indecent or impure, or manifestly tends to corrupt the morals of youth, or an obscene, indecent or impure print, picture, figure, image or description, manifestly tending to corrupt the morals of youth, or introduces into a family, school or place of education, or buys, procures, receives or has in his possession any such book, pamphlet, ballad, printed paper, phonographic record, obscene, indecent or impure print, picture, figure, image or other thing, either for the purpose of sale, exhibition, loan or circulation to a person under the age of eighteen years or with intent to introduce the same into a family, school or place of education, shall, for a first offense, be punished by imprisonment for not more than two years or by a fine of not less than one hundred nor more than one thousand dollars, or both, and for a subsequent offense by imprisonment for not less than six months nor more than two and one half years or by a fine of not less than two hundred nor more than two thousand dollars, or both.

* * *

§28B. *Sale, etc., of Obscene Book.*—Whoever imports, prints, publishes, sells, loans or distributes, or buys, procures, receives, or has in his possession for the purpose of sale, loan or distribution, a book, knowing it to be ob-

scene, indecent or impure, shall be punished by imprisonment for not more than two years or by a fine of not less than one hundred nor more than one thousand dollars, or both.

MICHIGAN Comp. Laws (1929)

16829 Obscene publication; printing, selling, buying, possessing, circulating; penalty. • • • If any person shall import, print, publish, sell or distribute any book, pamphlet, ballad, printed paper, or other thing, containing obscene language, or obscene prints, pictures, figures or descriptions, manifestly tending to the corruption of the morals of youth, or shall introduce into any family, school or place of education, or shall buy, procure, receive or have in his possession, any such book, pamphlet, ballad, printed paper or other thing, either for the purpose of sale, exhibition, loan or circulation, or with intent to introduce the same into any family, school or place of education, shall be punished by imprisonment in the county jail not more than one [1] year, or by fine not exceeding one thousand [1,000] dollars.

MINNESOTA Stat. (Henderson 1945)

617.24 Obscene Literature; penalty.

Every person who shall:

(1) Sell, lend, give away, or offer to give away, show, or have in his possession with intent to sell, give away, show, advertise, or otherwise offer for loan, gift, sale or distribution, any obscene or indecent book, magazine, pamphlet, newspaper, story paper, writing, picture, drawing, photograph, or any article or instrument of indecent or immoral character; or who shall design, copy, draw, photograph, print, utter, publish, or otherwise prepare such a book, picture, drawing, paper, or other article • • •

• • •

Shall be guilty of a gross misdemeanor and be punished by imprisonment in the county jail for not more than one year, nor less than 90 days, or by a fine of not less than $100, nor more than $500, or by both.

POOR COPY

BLEED THROUGH

MISSISSIPPI Code Ann. (1942)

§*2288. Obscenity* • • •.—A person who sells, lends, gives away, or shows, or has in his possession with intent to sell or give away, or to show or advertise, or otherwise offers for loan, gift, sale, or distribution, any obscene or indecent book, writing, paper, picture, drawing, or photograph, • • • or who designs, copies, draws, photographs or otherwise prepares such a book, picture, drawing or other article, • • • is guilty of a misdemeanor, and, on conviction, shall be punished by a fine of not over five hundred dollars or imprisonment in the county jail for not more than six months, or both.

MISSOURI Rev. Stat. (1939)

Sec. 4660. Penalty for circulating obscene matter.— Every person who shall manufacture, print, publish, buy, sell, offer for sale or advertise for sale, or have in his possession, with intent to sell or circulate, or shall give away, distribute or circulate any obscene, lewd, licentious, indecent or lascivious book, pamphlet, paper, ballad, drawing, lithograph, engraving, picture, photograph, model, cast, print, article or other publication of indecent, immoral or scandalous character, • • • shall, on conviction thereof, be fined not more than one thousand dollars nor less than fifty dollars, or be imprisoned not more than one year in the county jail, or both • • •.

MONTANA Rev. Codes Ann. (1935)

11136. • • • Every person who wilfully and lewdly • • •

• • •

3. Writes, composes, stereotypes, prints, publishes, sells, distributes, keeps for sale, or exhibits any obscene or indecent writing, paper, or book • • •

• • • is guilty of a misdemeanor.

NEBRASKA Rev. Stat. (1943)

28-921. Obscene literature; sale; penalty. Whoever sells or offers for sale, or gives away, or has in his possession with intent to sell, loan or give away, any obscene, lewd, indecent or lascivious book, pamphlet, paper, drawing, lithograph, engraving, picture, photograph, model, cast or any instrument or article of indecent or immoral use, * * * shall upon conviction thereof be punished by a fine of not more than one thousand dollars nor less than fifty dollars, or by imprisonment in the county jail not more than one year, or both.

NEVADA Comp. Laws Ann. (1929)

§*10144. Obscene Literature.* * * * Every person who—

1. Shall sell, lend, or give away, or have in his possession with intent to sell, lend, give away or show any obscene or indecent book, magazine, pamphlet, newspaper, story paper, writing, picture, drawing, photograph, or any article or instrument of indecent or immoral character; or who shall design, copy, draw, photograph, print, utter, publish or otherwise prepare such a book, picture, drawing, paper or other article * * *

Shall be guilty of a gross misdemeanor.

NEW HAMPSHIRE Rev. Laws (1942) c. 441

14. Publication, etc. No person shall print, sell, lend, give, or show to any other person any obscene book, pamphlet, magazine, newspaper, print, or picture, * * *.

* * *

Laws (1947) c. 73

* * * *17. Penalty.* If any person shall violate any of the provisions of the * * * preceding * * * [section] he shall be fined not more than five hundred dollars, or imprisoned not more than six months, or both.

POOR COPY

BLEED THROUGH

NEW JERSEY Rev. Stat. (1937)

2:140-2. Uttering or exposing obscene literature • • •. Any person who, without just cause, shall utter or expose to the view of another, or have in his possession with intent to utter or expose to the view of another, or to sell the same, any obscene or indecent book, pamphlet, picture or other representation, however made, • • • shall be guilty of a misdemeanor.

NEW MEXICO Stat. Ann. (1941)

14-1803. • • • The city council and board of trustees in towns shall have the following powers:

• • •

14-1812. • • • *Obscene publications.*—To • • • prohibit the sale or exhibiting of obscene or immoral publications, prints, pictures, or illustrations.

NEW YORK Penal Law

§1141. Obscene prints and articles

1. A person who sells, lends, gives away, distributes or shows, or offers to sell, lend, give away, distribute, or show, or has in his possession with intent to sell, lend, distribute or give away, or to show, or advertises in any manner, or who otherwise offers for loan, gift, sale or distribution, any obscene, lewd, lascivious, filthy, indecent or disgusting book, magazine, pamphlet, newspaper, story paper, writing, paper, picture, drawing, photograph, figure or image, or any written or printed matter of an indecent character; or any article or instrument of indecent or immoral use, or purporting to be for indecent or immoral use or purpose, or who designs, copies, draws, photographs, prints, utters, publishes, or in any manner manufactures, or prepares any such book, picture, drawing, magazine, pamphlet, newspaper, story paper, writing, paper, figure, image, matter, article or thing, or who writes, prints, publishes, or utters, or causes to be written, printed, published, or uttered, any advertisement or notice of any kind, giving information, directly or indirectly, stating, or purporting so to do, where, how, of whom, or by what means any, or what purports to be any, obscene, lewd, las-

civious, filthy, disgusting or indecent book, picture, writing, paper, figure, image, matter, article or thing, named in this section can be purchased, obtained or had or who has in his possession, any slot machine or other mechanical contrivance with moving pictures of nude or partly denuded female figures which pictures are lewd, obscene, indecent or immoral, or other lewd, obscene, indecent or immoral drawing, image, article or object, or who shows, advertises or exhibits the same, or causes the same to be shown, advertised, or exhibited, or who buys, owns or holds any such machine with the intent to show, advertise or in any manner exhibit the same; or who,

• • •

3. In any manner, hires, employs, uses or permits any minor or child to do or assist in doing any act or thing mentioned in this section, or any of them,

Is guilty of a misdemeanor, and, upon conviction, shall be sentenced to not less than ten days or more than one year imprisonment or be fined not less than fifty dollars nor more than one thousand dollars or both fine and imprisonment for each offense.

NORTH CAROLINA Gen. Stat. Ann. (1943)

§*14-189. Obscene literature.*—It shall be unlawful for any person, firm or corporation to exhibit for the purpose of gain, or display for sale, lend or hire, or otherwise publish or sell for the purpose of gain, or exhibit in any school, college, or other institution of learning, or have in his possession for the purpose of sale or distribution, any obscene literature, as determined and defined in the postal laws and regulations of the United States post office department, in the form of book, paper-writing, print, drawing, or other representation, at any newsstand, book store, drug store or other public or private places • • • [and if he does] he shall be guilty of a misdemeanor.

• • •

§*14-194. Circulating publications barred from the mails.*—It shall be unlawful for any news agent, news dealer, book-seller, or any other person, firm, or corporation to offer for sale, sell, or cause to be circulated within the State

POOR COPY

BLEED THROUGH

of North Carolina any magazine, periodical, or other publication which is now or may hereafter be excluded from the United States mails.

• • •

Any person, firm, or corporation violating any of the provisions of this section shall be guilty of a misdemeanor.

NORTH DAKOTA Rev. Code (1943)

12-2109. Buying, Selling, and Designing Obscene Literature; Bringing Into State; Misdemeanor. Every person who shall bring or cause to be brought into the state, or who shall buy, sell, or cause to be sold, or who shall advertise, lend, give away, offer, show, or exhibit, or have in his possession with intent to sell, lend, give away, offer, show, exhibit, distribute, or cause to be distributed, or who shall design, copy, draw, photograph, print, etch, or engrave, cut, carve, make, publish, or otherwise prepare or assist in preparing, or who shall receive subscriptions for any indecent or obscene book, pamphlet, paper, picture, print, drawing, figure, image, or other engraved, printed, or written matter, • • • shall be guilty of a misdemeanor, and shall be punished by a fine of not less than five dollars nor more than one hundred dollars, or by imprisonment in a county jail for not more than thirty days, or by both such fine and imprisonment.

OHIO Gen. Code Ann. (Supp. 1947)

Sec. 13035. Penalty for selling, exhibiting, possessing, etc., obscene literature • • •.

Whoever knowingly sells, lends, gives away, exhibits or offers to sell, lend, give away or exhibit, or publishes or offers to publish or has in his possession or has under his control an obscene, lewd or lascivious book, magazine, pamphlet, paper, writing, advertisement, circular, print, picture photograph, motion picture film or book, pamphlet, paper, magazine not wholly obscene but containing lewd or lascivious articles, advertisements, photographs, or drawing, representation, figure, image, cast, instrument or article of an indecent or immoral nature • • • or manufactures, draws, prints or makes such articles or things, • • •

COPY BOUND CLOSE IN CENTER

shall be fined not less than two hundred dollars nor more than two thousand dollars or imprisoned not more than seven years, or both.

OKLAHOMA Stat. (1941) tit. 21

§*1021.* * * * *Obscene or indecent writings* * * * .—Every person who wilfully and lewdly

* * *

* * * Writes or composes, stereotypes, prints, publishes, sells, distributes, or keeps for sale, or exhibits any obscene or indecent writing, paper or book, * * * is guilty of a felony and upon conviction therefor shall be punished by the imposition of a fine not less than Ten ($10.00) Dollars nor more than One Thousand ($1,000.00) Dollars or by imprisonment for not less than thirty (30) days nor more than ten (10) years, or by both such fine and imprisonment.

OREGON Comp. Laws Ann. (1940)

§*23-924. Writings* * * * *of obscene or indecent character* * * *. If any person shall import, design, copy, draw, photograph, prepare, publish, sell, lend, give away, distribute, show, or exhibit, or have in his possession, with intent to publish, sell, lend, give away, distribute, show, or exhibit, any * * * obscene or indecent book, paper, writing, printed matter, picture, drawing, photograph, or engraving; * * * such person shall, upon conviction thereof be punished by imprisonment in the county jail not more than six months, or by a fine of not more than $500 or by both fine and imprisonment in the discretion of the court.

PENNSYLVANIA Stat. Ann. (1945) tit. 18

§*4524. Obscene literature, etc.*

Whoever sells, lends, distributes, exhibits, gives away, or shows or offers to sell, lend, distribute, exhibit, or give away or show, or has in his possession with intent to sell, lend, distribute or give away or to show, or knowingly advertises in any manner, any obscene, lewd, lascivious, filthy, indecent or disgusting book, magazine, pamphlet,

POOR COPY

BLEED THROUGH

newspaper, storypaper, paper, writing, drawing, photograph, figure or image, or any written or printed matter of an indecent character, * * * or whoever designs, copies, draws, photographs, prints, utters, publishes, or in any manner manufactures or prepares any such book, picture, drawing, magazine, pamphlet, newspaper, storypaper, paper, writing, figure, image, matter, article or thing, * * * is guilty of a misdemeanor, and upon conviction, shall be sentenced to imprisonment not exceeding one (1) year, or to pay a fine not exceeding five hundred dollars ($500), or both.

PUERTO RICO Pen. Code (1937)*

§283. * * * Every person who wilfully and lewdly * * *

* * *

Publication or Sale of Obscene Matter * * * Writes, composes, stereotypes, prints, publishes, sells, distributes, keeps for sale, or exhibits any obcesne or indecent writing, paper, or books * * *

* * * is guilty of a misdemeanor.

RHODE ISLAND Gen. Laws (1938) c. 610

§13. Every person who shall import, print, publish, sell, or distribute any book, pamphlet, ballad, printed paper, or other thing containing obscene, indecent, or impure language, or manifestly tending to the corruption of the morals of youth, or any print, picture, figment, or other description which is indecent, impure, or manifestly tending to the corruption of the morals of youth, or shall introduce into any family, school, or place of education, or shall buy, procure, receive, or have in his possession any such book, pamphlet, ballad, printed paper, or other thing, either for the purpose of sale, exhibition, loan, or circulation, or with intent to introduce the same into any family, school, or place of education, shall be imprisoned not exceeding 2 years or be fined not exceeding $1,000.00 nor less than $100.00.

---

* A later revision, *Puerto Rico Compilacion Estatutos Revisados y Codigos, Penal (1941)*, apparently published only in Spanish, is not here available.

COPY BOUND CLOSE IN CENTER

SOUTH CAROLINA Code Ann. (1942)

§1443. Penalty for publishing, etc., obscene books, papers, etc.—Whoever knowingly imports, prints, publishes, sells or distributes any book, pamphlet, ballad, printed paper or other thing containing obscene, indecent or improper print, picture, figure or description manifestly tending to the corruption of the morals of youth, or introduces into a family, school, or place of education, or brings, procures, receives, or has in his possession, any such book, pamphlet, printed paper, picture, or ballad, or other thing, either for the purpose of sale, exhibition, to aid in a circulation, or with intent to introduce the same into a family, school, or place of education, shall be punished by imprisonment not exceeding two years, or by a fine not exceeding one thousand dollars, or both, at the discretion of the court.

SOUTH DAKOTA Code (1939)

13.1722 • • •. Every person who willfully and immorally:

• • •

(3) Writes or composes, stereotypes, prints, publishes, sells, distributes, or keeps for sale or exhibit by moving pictures or otherwise, any obscene or indecent writing, paper, book, or design, • • • is guilty of a misdemeanor.

TENNESSEE Code Ann. (Williams 1934)

11190 • • • *Obscene books.*—If any person print, publish, import, sell, or distribute any book, pamphlet, ballad, or printed paper containing obscene language or obscene prints, pictures, or descriptions, manifestly tending to corrupt the morals, or introduce the same into any family, school, or place of education, or have the same in his possession for the purpose of loan, sale, exhibition, or circulation, or with intent to introduce the same into any family, school, or place of education, he shall be guilty of a misdemeanor.

POOR COPY

BLEED THROUGH

TEXAS Pen. Code Ann. (1938)

Art. 526. • • • *Indecent publications* • • •

If any person shall make, publish or print any indecent and obscene print, picture or written composition manifestly designed to corrupt the morals of youth, • • • he shall be fined not exceeding one hundred dollars.

UTAH Code Ann. (1943)

15-8-1. • • •

The boards of commissioners and city councils of cities • • •

15-8-41. • • • *Immoral Publications.*

• • • may suppress or prohibit • • • the sale, distribution or exhibition of obscene or immoral publications, prints, pictures or illustrations.

VERMONT Pub. Laws (1933)

Sec. 8621. Books and pictures. A person who imports, prints, publishes, sells, lends, circulates, distributes, exhibits or introduces into a family or place of education a book, print, picture or other thing which is obscene, lewd or indecent, or which contains obscene, lewd or indecent language, prints, pictures, figures or descriptions, or which manifestly tends to the corruption of the morals of youth, or who buys, procures or has in his possession any such book, print, picture or other thing, with intent to sell, lend, circulate, distribute or exhibit the same, or to introduce it into a family or place of education, shall be imprisoned not more than one year or fined not more than two hundred dollars.

VIRGINIA Code Ann. (1942)

§4549. *Publishing, selling, exhibiting, distributing, et cetera, obscene books,* • • • *et cetera;* how punished.—If any person import, print, exhibit, publish, sell, lease, use, or distribute any books or other things containing obscene language, or any print, picture, motion picture

COPY BOUND CLOSE IN CENTER

film, figure or description manifestly tending to corrupt the morals of youth; or introduce into any family or place of education, or buy or have in his possession any such article for the purpose of sale, exhibition, or circulation, or with intent to introduce it into any family or place of education, he shall be guilty of a misdemeanor.

WASHINGTON Rev. Stat. Ann. (1932)

§*2459. Obscene literature.* Every person who—

(1) Shall sell, lend, or give away, or have in his possession with intent to sell, lend, give away or show any obscene or indecent book, magazine, pamphlet, newspaper, story paper, writing, picture, drawing, photograph, or any article or instrument of indecent or immoral character; or who shall design, copy, draw, photograph, print, utter, publish or otherwise prepare such a book, picture, drawing, paper or other article; * * *

* * *

Shall be guilty of a gross misdemeanor.

WEST VIRGINIA Code Ann. (1943)

§*6066.* * * * *Obscene Literature* * * * *Penalty.*—If any person import, print, publish, sell or distribute any book or other thing containing obscene language, or any print, picture, figure or description manifestly tending to corrupt the morals of youth, or tending to corrupt the public morals, or introduce into any family, school or place of education, or buy or have in his possession, any such thing, for the purpose of sale, exhibition or circulation, or with intent to introduce it into any family, school or place of education, he shall be guilty of a misdemeanor, and, upon conviction, shall be confined in jail not more than one year and fined not exceeding one thousand dollars.

WISCONSIN Stat. (1947)

351.38 Circulation of obscene books, etc. * * * (1) Any person who shall import, print, publish, exhibit, sell or distribute, have in his possession or give away any book

POOR COPY

BLEED THROUGH

or pamphlet, ballad, printed paper, moving picture or film, or other thing containing obscene language, prints, pictures, figures or descriptions tending to the corruption of morals, or shall introduce into any family, school or place of education, or shall buy, procure, receive or have in his possession any such book, pamphlet, ballad, printed paper, moving picture or film, or other thing, either for the purpose of loan, sale, exhibition or circulation or giving away, or with intent to introduce the same into any family, school or place of education shall be punished by imprisonment in the county jail not less than 3 months or not more than one year or by imprisonment in the state prison not less than one year or not more than 5 years or by fine not less than $100 or more than $5,000 * * *.

WYOMING Comp. Stat. Ann. (1945)

9-513. Selling obscene literature.—Whoever sells or lends, or offers to sell or lend, or gives away, or offers to give away, or in any manner exhibits, or has in his possession, with or without intent to sell, lend or give away, any obscene, lewd, indecent, or lascivious book, pamphlet, paper, drawing, lithograph, engraving, picture, daguerreotype, photograph, stereoscopic picture model, cast, instrument or article of indecent or immoral use, * * * shall be fined not more than one hundred dollars [$100.00], to which may be added imprisonment in the county jail not more than six [6] months * * *.

COPY BOUND CLOSE IN CENTER

FILE COPY

Office - Supreme Court, U.
FILED
OCT 22 1948
CHARLES ELMORE CROPL
CLER

Supreme Court of the United States

OCTOBER TERM, 1948

No. 11

DOUBLEDAY & COMPANY, INC.,
Appellant,

v.

THE PEOPLE OF THE STATE OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS AN *AMICUS CURIAE*

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae,
KENNETH W. GREENAWALT,
Counsel.

POOR COPY

BLEED THROUGH

INDEX

PAGE

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE 2

POINT I—The clear and present danger test should be the appropriate criteria in determining the constitutionality under the First Amendment of the suppression of works of literature by State Courts in construing and applying such a criminal obscenity statute 5

POINT II—The history of judicial censorship of literature as obscene, especially in New York, and the nature of the rights and of the penalty involved here, show the compelling necessity of an ascertainable standard of conduct and a proper test..... 16

POINT III—It is a matter of paramount public importance that freedom of artistic and literary expression be not confined, at least not short of the furthermost constitutional boundaries of protected expression 32

CONCLUSION 40

Table of Cases Cited

Abrams *v.* U. S., 250 U. S. 616, 630 (1919)..... 37

Bridges *v.* California, 314 U. S. 252, 267-8 (1941).....6, 8, 11, 12, 29, 36

Chaplinsky *v.* New Hampshire, 315 U. S. 568, 571 (1941) 9

Commonwealth *v.* Friede, 271 Mass. 318; 171 N. E. 472 (1930) 35

Commonwealth *v.* Isenstadt, 318 Mass. 543, 550 (1945) 29, 30

Craig *v.* Harney, 331 U. S. 367, 383 (1947).....6, 11, 12

PAGE

Dreiser *v.* Lane Co., 183 App. Div. 773, 775 (1918)..... 36
Dominus Rex *v.* Curl, 2 Strange 789 (K.B. 1727)..... 8

Gitlow *v.* New York, 268 U. S. 652, 666 (1925)..... 5

Halsey *v.* N. Y. Society for the Suppression of Vice, 234 N. Y. 1, 6 (1922)..... 24, 37, 38
Hannegan *v.* Esquire, 327 U. S. 146, 154 (1946)..7, 13, 34, 38
Herndon *v.* Lowry, 301 U. S. 242, 258 (1937).....9, 15, 16, 17, 29

Lovell *v.* Griffin, 303 U. S. 444, 452 (1937)..... 6

Maxon's case, 2 Mod. St. Tr. 356..... 34
Minersville District *v.* Gobitis, 310 U. S. 586, 604-5 (1940) 9

Near *v.* Minnesota, 283 U. S. 697, 717 (1930).....7, 9, 10
New York *v.* Winters, 294 N. Y. 545, 551.....28-29

Palmelee *v.* U. S., 113 Fed. 2nd 729 (1940).....15, 30
Pennekamp *v.* Florida, 328 U. S. 331, 335 (1945)..5, 6, 7, 13
People *v.* Berg, 241 App. Div. 543 (1934), aff'd 269 N. Y. 514 (1935)..... 20, 22, 25
People *v.* Brainard, 192 App. Div. 816, 820 (1920)..... 22, 23
People *v.* Creative Age Press, 192 Misc. 188, 190, 191 (May 19, 1948)..... 27, 28
People *v.* Dial Press, 182 Misc. 416 (1944)..... 20, 26
People *v.* Eastman, 188 N. Y. 478, 480 (1907)..... 22
People *v.* Fellerman, 269 N. Y. 514 and 629 (1936) 22, 25, 28
People *v.* Freide, 133 Misc. 611, 615 (1929)..... 25
People *v.* Gitter, 133 Misc. 693, 694..... 37
People *v.* Gotham Book Mart, Inc., 158 Misc. 240 (1936) 20, 24, 25, 28
People *v.* London, 63 N. Y. Supp. (2) 227 (1946)..... 21, 23
People *v.* Miller, 155 Misc. 446, 279 N. Y. Supp. 583 (1935) 24, 25
People *v.* Muller, 96 N. Y. 408, 411 (1884)..... 22
People *v.* Pesky, 230 App. Div. 200, 203, aff'd 254 N. Y. 373 (1930)..... 21, 22, 24, 28

POOR COPY

BLEED THROUGH

PAGE

People *v.* Seltzer, 122 Misc. 329, 333 (1924).....20, 22, 23, 25, 28

People *v.* Vanguard Press, 192 Misc. 125 (May 17, 1947) 26, 28

People *v.* Viking Press, Inc., 147 Misc. 813 (1933) 22, 24, 25

People *v.* Wallace & Co., 282 N. Y. 417, 419..... 17

People *v.* Wendling, 258 N. Y. 451, 453 (1932).....22, 23, 24

People *v.* Winters, 294 N. Y. 545, 550, 551..... 19

Petersdorff Abr. Vol. 6, 558, 559..... 34

Regina *v.* Hicklin (L. R. 3 Q.B. 360).....22, 30

Rex *v.* Wilkes, 4 Burr. 2527 (K.B. 1770) 8

Robertson *v.* Baldwin, 165 U. S. 275, 281 8

Rosen *v.* U. S., 161 U. S. 29, 43 (1896) 30

Schenck *v.* United States, 249 U. S. 47, 52 (1919) 12

Schneider *v.* State, 308 U. S. 147, 161 (1939) 6, 11

Southey *v.* Sherwood, 2 Meriv. 437 34

St. Hubert Guild *v.* Quinn, 64 Misc. 336, 118 N. Y. Supp. 582 (1909) 24, 28, 33

Swearingen *v.* U. S., 161 U. S. 446, 451 (1896) 30

The Queen *v.* Read, 11 Mod. 205 (Q.B. 1708) 8

Thomas *v.* Collins, 323 U. S. 516, 543 (1944).....6, 7, 10, 11, 13, 17, 28

Thornhill *v.* Alabama, 310 U. S. 88, 95 (1941).....5, 7, 10, 11, 13, 16, 17, 36

United States *v.* C.I.O., 535 U. S. 106, 139-140 (1948) 11, 17, 28, 29

U. S. *v.* Cohen Grocery Co., 255 U. S. 81 29

U. S. *v.* Levine, 83 Fed. 2nd 156 (C.C.A. 2nd, 1936).... 30

United States *v.* One Book Entitled Ulysses, 72 Fed. (2d) 705 (CCA 2nd 1934) 21, 30, 34

Whitney *v.* California, 274 U. S. 357, 372 .....10, 37

Winters *v.* New York, 333 U. S. 507, 509 (1948).....5, 6, 7, 9, 16, 17, 18, 26

Statutes Cited

	PAGE
New York Penal Law, Section 1141, Subdivision (1)	2, 6, 16
Laws of Mass., chap. 278, Acts of 1945, see 28A-H	30
Laws of 1881, Sec. 317, c. 676, as amended by Laws 1884, c. 380, Sec. 1	3
Laws of 1887, c. 692, Sec. 1	3
Laws of 1900, c. 731, Sec. 1	3
Laws of 1909, Ch. 88 as amd. by L. 1941, Ch. 25	2
Laws of 1941, c. 925, Sec. 1	3
United States Constitution:	
First Amendment	1, 2, 8, 13, 28, 29, 30, 36
Fourteenth Amendment	2, 5

Other Authorities

Alpert "Judicial Censorship of Obscene Literature", 52 Harv. Law Rev. (1938)	8, 25, 30, 36
Charpentier et Cie. "Correspondence"	34
Encyclopedia Brittanica, Vol. 20, Articles on Sculpture, Sculpture Technique and Painting	14
Kinsey, et al. "Sexual Behavior in the Human Male"	14
Lecky's "Rationalism in Europe"	33
Lippman "A Preface To Morals"	14
Pound, 21 Harv. Law Rev. 383	
Strachey "Landmarks in French Literature"	34
Note: 47 Columbia Law Rev. 686	18

POOR COPY

BLEED THROUGH

Supreme Court of the United States

OCTOBER TERM, 1948

No. 11

DOUBLEDAY & COMPANY, INC.,
Appellant,

v.

THE PEOPLE OF THE STATE OF NEW YORK.

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS AN *AMICUS CURIAE*

Preliminary Statement

This brief is filed by consent of the parties.

The American Civil Liberties Union is a non-profit, non-partisan organization of nation-wide membership devoted to protecting and upholding the fundamental freedoms guaranteed to all United States citizens by the Federal and State Constitutions. It regards as most vital the personal freedoms assured in the First Amendment of the Federal Constitution. It is interested in this case because it involves an important and novel aspect of one of those freedoms—the freedom of the press.

The problem presented here concerns the judicial censorship and suppression of a serious work of literature, by

the construction and application of a broad state obscenity statute, in relation to the First and Fourteenth Amendments which protect the freedoms of speech and press from abridgment by the States as well as by Congress. What standard should be set up and applied in the construction of such a State statute in respect of such a literary product? What should be the applicable tests and determining criteria in this class of case? Should not the "clear and present danger" test, as stated and applied so often by this Court in cases involving rights under the First Amendment, be applicable to this type of case? What "substantial evil" was this statute designed to protect? How clear, serious, actual and impending is the "danger", if any?

We shall limit ourselves to a discussion of the constitutional questions inherent in the situation presented by the record and proceedings in this case.

Statement of the Case

Appellant was convicted, on two separate informations, of the crimes of publishing and of selling a certain obscene, lewd, lascivious, filthy, indecent and disgusting book entitled "Memoirs of Hecate County" by Edmund Wilson, in violation of Section 1141, subdivision (1) of the New York Penal Law. (Laws of 1909, Ch. 88 as amd. by L. 1941, Ch. 25.) It was fined $500 on each count and admonished that a future publication or sale would result in a prison sentence.

The defendant was found guilty by two of three Justices of Court of Special Sessions, City and County of New York, before whom the case was tried, without a jury. The dissenting Justice wrote an unreported opinion. The

POOR COPY

BLEED THROUGH

majority wrote none. Neither of two New York appellate courts, in affirming the conviction, wrote an opinion (272 App. Div. 799; 297 N. Y. 687).

The statute under which appellant was convicted provides in part:

> "§1141. **Obscene prints and articles.**
>
> 1. A person who sells, lends, gives away, distributes or shows, or offers to sell, lend, give away, distribute, or show, or has in his possession with intent to sell, lend, distribute or give away, or to show, or advertises in any manner, or who otherwise offers for loan, gift, sale or distribution, any obscene, lewd, lascivious, filthy, indecent or disgusting book, magazine, pamphlet, newspaper, story paper, writing, paper, picture, drawing, photograph, figure or image, or any written or printed matter of an indecent character; * * * or who designs, copies, draws, photographs, prints, utters, publishes, or in any manner manufactures, or prepares any such book, picture, drawing, magazine, pamphlet, newspaper, story paper, writing, paper, figure, image, matter, article or thing, * * *.
>
> Is guilty of a misdemeanor, * * *."

This section of the statute is derived from Penal Code, Sec. 317, Laws 1881, c. 676, as amended by Laws 1884, c. 380, Sec. 1; Laws 1887, c. 692, Sec. 1; Laws 1900, c. 731, Sec. 1; Laws 1941, c. 925, Sec. 1.

The condemned book, "Memoirs of Hecate County", consists of a series of six interrelated chronicles about a group of suburbanites, typical of that "lost generation"—the American middle class between wars. It describes the adventures of a damned soul among his bedeviled contemporaries. It is a satirical work which portrays and characterizes realistically, sternly and critically the

quality of modern culture and civilization in several literary groups—the way people act, feel, think. The figure of the devil appears throughout the book in various manifestations, as a functioning character, representing the forces of egotism, pride, vulgarity and surrender of moral integrity. Throughout the book runs a common theme—a theme of the corrupting influences pervading the present generation and culture. The theme is very moral. Its apparent intent is to induce in the reader a sense of disgust with all he is likely to find around him in his life.

The book is a serious work of literature. It received favorable reviews from leading literary periodicals and critics. For instance, Time Magazine described it as "the best contemporary chronicle, so far, of its place and period", and "The first event of the year which can be described as literary".

The author has had a distinguished career as editor, writer and critic. He is said to be the best known American literary critic in this country and abroad. In literary circles, both academic and public, his reputation is of the highest. His prior works have been used in college literature courses.

The defendant is an old, well-known, highly reputable publisher and retailer of books. It distributed and sold this book openly, widely, publicly and by advertisement.

The prosecutor's attack was directed to only one of the six stories "The Princess with the Golden Hair" and to specific passages therein. This is an adroitly told story of two contrasting amatory adventures of an educated, unmarried, male, dilettante.

The State's evidence consisted solely of the book and proof, by defendant's concessions and by an agent of the

BLEED THROUGH POOR COPY

Society for the Suppression of Vice, that defendant published and openly sold the book at its Fifth Avenue Store. No evidence was given or offered of any danger that a substantial evil would result from this book.

The constitutional question was duly and repeatedly raised, but ignored.

POINT I

The clear and present danger test should be the appropriate criteria in determining the constitutionality under the First Amendment of the suppression of works of literature by State Courts in construing and applying such a criminal obscenity statute.

The freedoms of speech and of the press are protected by the due process clause of the Fourteenth Amendment from impairment by State action (*Winters* v. *New York,* 333 U. S. 507, 509 (1948); *Gitlow* v. *New York,* 268 U. S. 652, 666 (1925); *Pennekamp* v. *Florida,* 328 U. S. 331, 335 (1945); *Thornhill* v. *Alabama,* 310 U. S. 88, 95 (1940)).

State power in the field of this case has not been tested heretofore in this Court because not until 1925 in the *Gitlow* case, *supra,* was it recognized that, under the Fourteenth Amendment, the States must conform to the same standards of freedom of expression as, under the First Amendment, are applicable to the Federal Government and because no case involving the construction and application of a state obscenity statute in relation to a literary work has come before this Court. (*Winters v. New York, supra,* involved a cheap and sensationally illustrated detective magazine condemned by New York, not as obscene,

but as violating subdivision 2 of Section 1141 of the Penal Law relating to publications massing crime news.) That the exercise of such State power has not for long years or ever been tested in this Court, does not give sanctity to prior untested violations by the States (*Bridges* v. *California,* 314 U. S. 252, 267-8 (1941) and *Winters* v. *New York, supra,* at pp. 511, 520).

The constitutional limits of free expression in the Nation do not, or should not, vary with State lines (*Pennekamp* v. *Florida, supra,* at p. 335; *Bridges* v. *California, supra,* at p. 260). The right is a national right, federally guaranteed and available for exercise to all citizens of the Republic (*Thomas* v. *Collins,* 323 U. S. 516, 543 (1944)).

In recent years this Court frequently has expressed itself as to the nature, wide scope and vital importance of these liberties.

It has characterized the freedoms of speech and of the press as fundamental personal rights and principles; and has stressed the great importance of protecting the enjoyment of these essential liberties from every sort of restriction or infringement (*Schneider* v. *State,* 308 U. S. 147, 161 (1939); *Lovell* v. *Griffin,* 303 U. S. 444, 452 (1937) and cases therein cited). Recently Mr. Justice Murphy wrote that "a free press lies at the heart of our democracy and its preservation is essential to the survival of liberty" and "any inroad made upon the constitutional protection of a free press tends to undermine the freedom of all men to print and to read the truth" (*Craig* v. *Harney,* 331 U. S. 367, 383 (1947)).

The press, in its historic connotation, comprehends every sort of publication which affords a vehicle of information and opinion (*Lovell* v. *Griffin, supra,* at p. 452). The rights of free speech and free press are not confined to "any

POOR COPY

BLEED THROUGH

field of human interest" (*Thomas* v. *Collins, supra,* at p. 531).

This Court twice recently has quoted with approval an historic statement that the importance of freedom of the press consists in the advancement of truth, science, morality and arts in general (*Thornhill* v. *Alabama, supra,* at p. 102; *Near* v. *Minnesota,* 283 U. S. 697, 717 (1930)); and, in reference to the postal laws, it has observed that the policy of Congress has been to encourage the distribution of periodicals devoted to literature, the sciences, arts, or some special industry because it was thought "those publications as a class contributed to the public good" (*Hannegan* v. *Esquire,* 327 U. S. 146, 154 (1946)). Literature is a recognized art.

The constitutional protection for a free press does not apply merely to the exposition of ideas. It applies to works of fiction. It covers publications which inform as well as those which entertain and the most valuable as well as the least valuable literature. It covers distribution as well as publication (*Winters* v. *New York, supra,* at p. 510).

This Court has said that freedom of discussion (press and speech) of the "problems of society" is a cardinal principle of Americanism (*Pennekamp* v. *Florida, supra,* p. 8); embraces, at least, the liberty to discuss publicly and truthfully "all matters of public concern" without previous restraint or fear of subsequent punishment; and, if it would fulfill its historic function in this nation, must embrace "all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period" (*Thornhill* v. *Alabama, supra,* at pp. 101-2).

No limitation is expressed in the First Amendment in respect of the scope of the freedom of speech and press. It contains no restrictions as to type of publication, utterance or expression or as to the nature of subject matter.

The First Amendment does not speak equivocally. It prohibits any law abridging the freedom of speech or of the press. It must be taken as a command of the broadest scope that explicit language read in the context of a liberty-loving society, will allow (*Bridges* v. *California, supra,* at pp. 263-265).

Before the Constitution was adopted there had been several instances of judicial censorship of literature as obscene under the English common law. Originally, and also at that time, this was regarded as an offense against religion, triable, at first, in ecclesiastical courts and, later, in common-law courts (*The Queen* v. *Read,* 11 Mod. 205 (Q.B. 1708); *Dominus Rex* v. *Curl,* 2 Strange 789 (K.B. 1727); *Rex* v. *Wilkes,* 4 Burr. 2527 (K.B. 1770); See also Alpert "Judicial Censorship of Obscene Literature", 52 Har. Law Rev. 40, 44 (1938)). The English common law did not become part of our Constitution, particularly as to free speech and press, as was suggested earlier in *Robertson* v. *Baldwin,* 165 U. S. 275, 281. Rather, one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press. The Constitution was ratified while the memory of oppressive English restrictions on the enumerated liberties was still fresh; and the First Amendment cannot reasonably be taken as approving prevalent English practices (*Bridges* v. *California, supra,* at pp. 264-5).

This Court has said that the rights of free speech and press are not absolute and that a State in exercise of its police power may punish abuses thereof. The "police power" is usually described as "the authority of the State

POOR COPY

BLEED THROUGH

to enact laws to promote the health, safety, morals and general welfare of its people". (See *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 571 (1941) and *Near* v. *Minnesota, supra,* at p. 707 and cases there cited). The Court has also suggested, in dicta supported by meagre authority, that speech and publications are subject to control if lewd, indecent, obscene or profane (*Chaplinsky* v. *New Hampshire, supra,* at p. 572; *Near* v. *Minnesota, supra,* at p. 706; *Winters* v. *New York, supra,* at p. 510). The *Chaplinsky* case had reference to words uttered orally on a public street and inciting an immediate breach of peace.

At the same time the Court has pointed out that the limitation upon individual liberty by a State in exercise of that power must find its justification in a reasonable apprehension of danger to organized government and must have appropriate relation to the safety of the State, otherwise it violates the constitutional principle (*Herndon* v. *Lowry,* 301 U. S. 242, 258 (1937)); and that the limits of this police power must always be determined with appropriate regard to the particular subject of its exercise (*Near* v. *Minnesota, supra,* at p. 707). It has also noted and warned that historically, most infringements of personal liberty have been justified in the name of righteousness and the public good (*Minersville District* v. *Gobitis,* 310 U. S. 586, 604-5 (1940), Stone, J., dissenting; as overruled 319 U. S. 624, 637).

The Court has stated that the safeguarding of these rights to the end that men may speak as they think "on matters vital to them" and that falsehoods may be exposed through the processes of education and discussion is essential to free government; that noxious doctrines may be refuted and their evil averted by the courageous exercise of free discussion; and that abridgment of free

speech and press impairs the opportunities for public education essential to the effective exercise of popular government (*Thornhill* v. *Alabama, supra,* at pp. 88, 95; *Whitney* v. *California,* 274 U. S. 357, 372). It has cited, with approval, Madison's remarks that while some degree of abuse is inseparable from the proper use of everything, including the press, it was in the minds of the founding fathers "that it is better to leave a few of its noxious branches to their luxuriant growth than by pruning them away to injure the bigger of those yielding the proper fruits" (*Near* v. *Minnesota, supra,* at pp. 717-18).

In *Thomas* v. *Collins, supra,* at pp. 545-6, Mr. Justice Jackson, concurring, stated:

> "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us. • • • These [speech and press] are thereby left great range of freedom.
>
> "This liberty was not protected because the forefathers expected its use would always be agreeable to those in authority or that its exercise always would be wise, temperate or useful to society."

The judgment in the first instance is for the legislative body. But mere legislative preferences or beliefs are not enough in civil rights cases. Where abridgment of these rights is asserted the delicate and difficult task falls upon the courts—and upon this Court independently—to weigh the circumstances and to appraise the substantiality of the

POOR COPY

BLEED THROUGH

reasons advanced in support of the regulation of the free enjoyment of the rights, to the end that there be no intrusion upon this domain unless grave and impending public danger requires this (See *United States* v. *C.I.O.*, 335 U. S. 106, 139-140 (1948) and the *Thomas, Schneider, Thornhill, Bridges* and *Craig* cases, *supra*).

Where the State's power begins and where the individual's freedom ends is the line that always must be drawn. It is a delicate choice, particularly where the presumption supporting legislation is balanced by the preferred place given to these freedoms, but there is no room for "doubtful intrusions". It is the character of the right, not the limitation, which determines what standard governs the choice; and the presumption of constitutionality that is accorded to other legislation is refused to statutes affecting civil liberties (*Thomas* v. *Collins, supra,* at pp. 529-30; *United States* v. *C.I.O., supra,* at p. 140).

It was to aid in that choice and to find a practical workable test that the "clear and present danger" rule has been formulated and adopted by this Court.

Mr. Justice Rutledge continuing in *Thomas* v. *Collins, supra,* says at p. 530:

> "For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only

> the gravest abuses, endangering paramount interests, give occasion for permissible limitation. It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction. * * *."

That rule, as originally stated in *Schenck* v. *United States,* 249 U. S. 47, 52 (1919), has afforded a practical guidance and has been applied and restated by this Court in a large number and variety of cases in which the scope of the constitutional protections of the freedom of expression was in issue in relation to State statutes or acts effected under the police power (*Bridges* v. *California, supra,* at p. 262).

A fair summation of the rule was given in the *Bridges* case at pp. 262-3:

> "Moreover, the likelihood, however great, that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press. The evil itself must be 'substantial', * * * it must be serious' * * *."
>
> "What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here."

The danger must not be remote or even probable; it must immediately imperil; the utterances, undoubtedly, must be a serious and immediate threat. The clear and present danger test "is fashioned to serve the needs of all litigation, not merely selected types of pending cases" (*Craig* v. *Harney, supra,* at pp. 376, 378).

POOR COPY

BLEED THROUGH

From the foregoing principles it seems apparent that the clear and present danger test is applicable in the instant type of case.

The case involves a limitation of the constitutional freedom of expression (press) under a criminal obscene statute as construed and applied by State courts. The statute does not state the purpose or reasons for its enactment, define its terms or set forth tests to be applied in construing it. Presumably its enactment was originally justified in the 1880's as an exercise of some phase of police power. The New York courts have not interpreted the statute in relation to this book and have not stated the reasons for suppressing it or the test they applied in condemning it or the respects in which they considered it obscene. Since the attack of the prosecutor was concentrated solely on "The Princess with the Golden Hair", it may be assumed that the courts objected to the discussion therein of the sex thoughts, life and activities of the male character narrating the chronicle.

The First Amendment does not exclude from its protection discussions of sex life or conduct or books dealing with or delineating the morals and manners of the times. It does not condemn expressions which may be "beyond the conventions of the day". Sex and sex behavior certainly is a "field of human interest" and a matter "vital to men". Today, as never before, sex behavoir problems are "problems of society" and are issues about which information is needed to enable today's members of society to cope with the exigencies of their period. Today sex is not even an "unconventional" subject. (Cf. *Thomas, Thornhill, Pennekamp* and *Hannegan* cases, *supra*).

Lippman in his "A Preface to Morals", pp. 285, 300, speaks of "man's immense preoccupation with sex" and of the "immense and urgent discussion of sex throughout the modern world".

The recent report of *Kinsey, et al.* on "Sexual Behavior in the Human Male", which is based on thousands of case histories and for many months has been a leading "best seller", confirms Lippman's observation and shows conclusively that the sex life and conduct described in this book is not uncommon in this country. There is every indication that the picture painted by this author is a truthful portrayal of the sex morals, manners and thinking of at least one segment of our society and culture. Our present culture is characterized by a revealing frankness and realism in respect of artistic expressions, in painting, sculpturing, literature, plays, movies, advertising, attire and so on.

In recent years the market has been flooded with books and other publications devoted to a frank discussion of sex, sex behavior and sex problems from the point of view of biology, psychology, sociology, anthropology, education, psychiatry, birth control, marital relations, sex instruction and techniques, etcetera. Historical novels candidly portraying human sex conduct in other periods have long been best sellers. Many books have been published dealing in specific detail with the sex life of primitives and savages and of insects, birds, fish and animals. The subject of sex no longer is regarded as taboo, secret, pagan.

For some time nudes have been painted without veils and sculptured without fig leaves and both have been freely displayed and illustrated in books and catalogues (See articles and plates on "Sculpture", "Sculpture Technique" and "Painting", *Encyclopedia Brittanica,* Vols. 17, 20). Examples of what might be

BLEED THROUGH POOR COPY

regarded by some as highly provocative statues are the nude female torsos by Archipenko, Maillol, Epstein and LaChase; and, particularly, Rodin's "L'Eternal Printemps" and "The Kiss" and Maillol's "Desire", each of which shows a nude couple in an intimate and suggestive embrace. (See also many authorities cited in *Palmelee* v. *U. S.*, 113 Fed. 2nd 729 (1940)).

It is extremely difficult to believe that a non-illustrated work of literature, such as the one here, would be as provocative of evil thoughts or acts as current expressions and stimuli in other fields or that such a book would materially accentuate the normal thoughts, desires and impulses inherent in the human mind and body as a result of normal sex instincts. (Cf. Alpert *"Judicial Censorship of Obscene Literature", supra,* at pp. 73-4, *supra,* where the author presents the opinion backed by statistics that books are not a material factor in causing sexual stimulation in relation to other stimulating factors existing in our contemporary civilization).

Under the clear and present danger rule, New York was required to show the sale and production of this book created a danger, (clear, present and immediate and not just likely, possible, probable or remote) of bringing about a substantial, extremely serious evil that the State of New York had a right to prevent—whether that evil be a corruption of public morals or an injury to public order or something else. That was the test required by the above authorities.

Even if it had been shown or found that the book had an inherent or reasonable tendency or mere likelihood to cause such a result, that would not be enough of a showing to justify a restriction of free expression. (*Herndon* and *Bridges* cases, *supra.*)

POINT II

The history of judicial censorship of literature as obscene, especially in New York, and the nature of the rights and of the penalty involved here, show the compelling necessity of an ascertainable standard of conduct and a proper test.

In this type of case the need of an ascertainable standard as to the kind of conduct prohibited is particularly compelling. Violation of the New York obscenity statute is a misdemeanor punishable by a fine of from $50 to $1,000 or imprisonment for ten days to one year, or both, for each offense (Sec. 1141 (3) Penal Law, *supra*).

Aside from the statutory penalties, when a book is suppressed there results a serious loss of money and property to the publisher and of the fruits of long intellectual labor to the author. If the book has any literary merit or substance, such a suppression also results in a real loss to the reading public and to society. Merely the fear and threat of criminal prosecution and punishment and resulting loss of property is an inherent form of censorship and stifles creative effort in literature (Cf. *Thornhill* case, *supra*, at pp. 97-8).

The standards of certainty in statutes punishable for offenses is higher than in those which depend on civil sanction for enforcement. The crime must be defined with appropriate definiteness. There must be ascertainable standards of guilt as to the meaning and scope of the statute and in regard to the applicable tests to ascertain guilt (*Winters* v. *New York*, *supra*, at pp. 515-516 and cases there cited; *Herndon* v. *Lowry*, *supra*, at pp. 261-4).

POOR COPY

BLEED THROUGH

Such a statute, as construed and applied to a particular defendant, must furnish a sufficiently ascertainable standard of guilt and where it fails to do so, the law necessarily violates the constitutional right (*Herndon* v. *Lowry, supra,* at p. 264).

When acts are to be made penal and are to be visited with loss or impairment of life, liberty or property, political liberty under constitutional guarantees requires clear and exact definition of the offense (*People* v. *Wallace & Co.,* 282 N. Y. 417, 419; *Pound,* 21 Harv. Law Rev. 383, 387).

The standard of definiteness for legislation involving civil liberties is more stringent than that for other types of laws and there is no presumption of constitutionality as to such legislation (*Thomas* v. *Collins, supra,* at pp. 529-30; *United States* v. *C.I.O., supra,* at p. 140). A failure of a statute limiting freedom of expression to give fair notice of what acts will be punished violates due process. There is a particular importance of a maintenance of standards of certainty in the field of criminal prosecution for violation of statutory prohibitions against distribution, although the Court is dealing with an aspect of a free press in its relation to public morals (*Winters* v. *New York, supra,* at pp. 509, 510).

In light of criminal penalties for miscalculation the burden of determining whether or not a given utterance could constitutionally be proscribed is considered so heavy as to result in a restriction on that free dissemination of ideas which the First amendment protects. (61 Harv. Law Rev. 1208, 1210. *Thornhill* v. *Alabama, supra,* at p. 97.)

The New York obscenity statute is very broad. It does not define the words used therein. It lays down no

test for obscenity. Neither the trial court nor either of the appellate courts wrote an opinion stating the reasons for the suppression of this book, or the respects in which the book was deemed to have offended, or the test or tests which were applied to ascertain the defendant's guilt, or the claimed evil it would cause. Neither this author or publisher nor any other author or publisher has received any light from these courts as to what conduct or what particular words are unlawful and prohibited. No criteria for future conduct is furnished. Although the constitutional questions and the applicabilty of the clear and present danger test were duly raised, there is no indication that the New York courts applied that test or regarded it as relevant.

When the courts of a State deprive the reading public of a work of fiction by an eminent literary critic of the day, it seems incumbent upon them to state their reasons (47 Col. Law Rev. 686, 688 (1947)).

In *Winters* v. *New York, supra,* at page 518, the majority of this Court suggested (p. 518) that the words obscene, lewd, lascivious, filthy, indecent and disgusting are "well understood" through long use in the criminal law, thus permitting statutory uncertainty; but it further suggested (p. 514) that the construction and interpretation given such a statute by the State courts fixes its meaning and puts the interpretive words into the statute as definitely as if amended by the legislature. However, the minority Justices (p. 538) doubted the assumption that long use in criminal law gives assurance of clear meaning and expressed disbelief that the law reports permit one to say that statutes condemning obscenity are much more unequivocal guides to conduct than the statute furnishes.

POOR COPY

BLEED THROUGH

The decisions of the New York courts under this obscenity statute certainly do not reflect that the meaning of the statutory words is either clear or "well understood", but rather, reflect a maze of equivocation and confusion on the subject.

The Court of Appeals in that very case (*People* v. *Winters*, 294 N. Y. 545, 550, 551), after referring to the caption of Section 1141 "Obscene prints and articles", said:

> "Indecency and obscenity are not and never have been technical terms of the law and hence we are without any full or rigorous definition of the uses made thereof in the administration of justice." • • •
>
> "In the nature of things there can be no more precise test of written indecency or obscenity than the continuing and changeable experience of the community as to what types of books are likely to bring about the corruption of public morals or other analogous injury to the public order. Consequently, a question as to whether a particular publication is indecent or obscene in that sense is a question of the times • • •."

One can hardly say that the "continuing and changing experience of the community" or the mere likelihood that some vaguely defined evil may result in some indefinite period of time furnishes any reasonably ascertainable guide to an author or publisher as to the permissible limits of free expression. It certainly can not be expected of such a person that he conduct a "Gallup poll" throughout the nation or the state on the subject of what type of books are likely at a given time to result in the evil suggested or some other undefined evil.

In his learned article on "Judicial Censorship of Obscene Literature" *supra*, at p. 64, Mr. Alpert, after

reviewing the decisions of the New York courts on the subject, states: "As must already be patent, however, the New York law is a very welter of dissonances"; and adds that the magistrates in New York City "have created their own tests for obscenity in literature".

In *People* v. *Seltzer*, 122 Misc. 329, 333 (1924), the court said that the subject had been left in a "confused state" because of the inconsistency of prior interpretations due in part at least to "the breadth of the section's scope."

In *People* v. *Gotham Book Mart, Inc.*, 158 Misc. 240 (1936), Magistrate Perlman, who dissented here in reviewing the New York decisions, stated:

> "Opinions are bound to vary. This fact we must recognize. This difference is reflected in the decisions of our own courts. From what is the public to be protected? Who are to be protected? What test shall be applied? Shall we consider the opinion of literary critics? Are 'de-luxe' editions exempt from the provisions of our land? The answers to these questions are not in accord. Judges like all human beings vary in their views."

In *People* v. *Berg*, 241 App. Div. 543 (1934), aff'd 269 N. Y. 514 (1935), the Court observed that in the prior judicial opinions "no clear standard [is] given for determining obscenity and indecency" but therefrom "there does emerge somewhat hazily", the rule hereafter mentioned (*infra*, p. 22).

In *People* v. *Dial Press*, 182 Misc. 416 (1944), the Magistrate remarked that he had "plodded through the definitions in two dictionaries of the several words used" and had come to the conclusion "that each of these words is synonymous with the others". Although the People contended he could not do so, he resorted, in desperation, to the Federal rule, under a different type of statute, as stated

BLEED THROUGH POOR COPY

in *United States* v. *One Book Entitled Ulysses*, 72 Fed. (2d) 705 (CCA 2nd 1934).

Very recently another Magistrate, confronted with the confusion of the prior judicial authorities, observed in *People* v. *London*, 63 N. Y. Supp. (2) 227 (1946):

> "The words used by the statute 'obscene, lewd, lascivious, filthy, indecent', are not self-defining. Nor are the dictionaries of much help in determining their precise meaning. • • •
>
> "We must turn for an authoritative interpretation of the meaning of the statutory language to the decisions of our courts. Unfortunately, these decisions do not furnish an infallible guide for determining when a book is obscene or indecent. A recent critic of the New York decisions on the suppression of obscene literature states that they are a 'very welter of dissonances.' • • • This is particularly true of Magistrates' Court decisions interpreting Section 1141 of the Penal Law. • • • Obviously, the test of obscenity and indecency used by Magistrate Keutgen [in *Dial Press* case, *supra*] is far more strict and would bar many more books than that used by Magistrate Greenspan [in *Viking Press* case, *infra*].
>
> "Similar differences of opinion may also be noted in the decisions of higher courts. • • • These tests of People *v.* Berg, however, have been qualified by many cases."

The attitudes and confusion of the judges in the lower criminal courts are extremely important in this class of case. They are the triers of the fact. There is the real battleground. The Court of Appeals in affirming a conviction said in *People* v. *Pesky*, 254 N. Y. 373:

> "This court is a court of review, restricted in cases of this order to a pronouncement of the law, and without power to act as a trier of the facts.

> If those charged with the duty to pass judgment upon the facts might say not unreasonably that the book sold by the defendant was obscene, lewd or indecent beyond a reasonable doubt (Penal Law, §1141), we are not at liberty to substitute our judgment for theirs, or to supersede their function as the spokesmen of the thought and sentiment of the community in applying to the book complained of the standard of propriety established by the statute."

That court, not infrequently, as here, has affirmed convictions without opinion (cf. *People* v. *Berg, supra* and *People* v. *Fellerman,* 269 N. Y. 514 and 629 (1936)).

Reference to the decisions themselves indicate the reason for the welter of vagueness, uncertainty and confusion that has grown up.

In several cases it is stated that the question is whether the tendency of the play or publication is to excite lustful and lecherous desire (*People* v. *Wendling,* 258 N. Y. 451, 453 (1932); *People* v. *Eastman,* 188 N. Y. 478, 480 (1907); *People* v. *Brainard,* 192 App. Div. 816, 820 (1920)).

Other cases have said that the test of an obscene book was that stated in *Regina* v. *Hicklin* (L. R. 3 Q. B. 360), i.e., whether the tendency of the matter charged as obscenity is to deprave or corrupt those whose minds are open to such influences and who might come in contact with it (*People* v. *Muller,* 96 N. Y. 408, 411 (1884); *People* v. *Pesky, supra,* 230 App. Div. 200, 203, aff'd 254 N. Y. 373 (1930); *People* v. *Seltzer, supra,* at pp. 333, 335-6; *People* v. *Viking Press, Inc.,* 147 Misc. 813 (1933)).

In *People* v. *Berg, supra,* at pp. 544-545, the rule the Court said emerged "somewhat hazily" from the prior opinions was "that an obscene book is one that 'tends to corrupt the morals of youth', or 'to lower the standards

POOR COPY

BLEED THROUGH

of right and wrong specifically as to the sexual relation'. To be deemed obscene it must show 'sexual impurity' and result in 'the exciting of lustful and lecherous thoughts and desires' or tend 'to stir sex impulses or to lead to sexually impure thoughts'." Also, in referring to the unnamed book therein, that Court stated:

> "In addition it lacks literary merit. It teaches no lesson and points no moral. It describes no period of history and the people or characters of that time and their conduct and habits of life—such, for instance, as the 'Elizabethan Age;' and no folk lore or tales of primitive people living in isolated regions. We cannot believe that the story is one even possibly true or representative of any individual or of any limited class. In our opinion it is obscene, lewd, lascivious and disgusting, and nothing more; and was so intended to be for purely mercenary purposes."

(See also, *People* v. *London, supra,* at p. 230.)

In *People* v. *Brainard, supra,* the court refused to suppress as obscene a book about a prostitute though it found no useful purpose in the publication or that it had any moral lesson to teach.

In the *Wendling* case, *supra,* the Court said the play involved was vulgar, profane, indecent, but that "One may call a spade a spade without offending decency, although modesty may be shocked thereby".

In the *Seltzer* case, *supra,* the Court, after referring to the tests first above noted, added a further one to the effect that matter is obscene which is "so filthy and disgusting as to be revolting to those who may have occasion to read them".

In several cases it has been stated that it is no part of the duty of Courts to exercise a censorship over literary

productions (*People* v. *Wendling, supra; St. Hubert Guild* v. *Quinn*, 64 Misc. 336, 118 N. Y. Supp. 582 (1909); *People* v. *Pesky, supra*, dissenting opinion, 230 App. Div. 200, at p. 206; *People* v. *Miller*, 155 Misc. 446, 279 N. Y. Supp. 583 (1935); *People* v. *Gotham Book Mart, Inc., supra*, at p. 243).

In *Halsey* v. *N. Y. Society for the Suppression of Vice*, 234 N. Y. 1 (1922), the Court in holding that Gautier's novel "Mademoiselle de Maupin" was not obscene, though parts of it were vulgar and indecent, referred to the fact that it was the work of a great author written in admirable style which had become part of classical literature.

In *People* v. *Viking Press, Inc., supra*, at page 814, holding Erskine Caldwell's book "God's Little Acre" not obscene, the Court said:

> "The statute is aimed at pornography, and a pornographic book must be taken to be one where all other incidents and qualities are mere accessories to the primary purpose of stimulating immoral thoughts.
>
> "The courts have strictly limited the applicability of the statute to works of pornography and they have consistently declined to apply it to books of genuine literary value. If the statute were construed more broadly than in the manner just indicated, its effect would be to prevent altogether the realistic portrayal in literature of a large and important field of life. The Court of Appeals has consistently frowned upon such an interpretation of the statute. (*People* v. *Wendling*, 258 N. Y. 451; *Halsey* v. *N. Y. Society for the Suppression of Vice*, 234 id. 1.)"

In this case the Court pointed out the book was an attempt to portray, in a realistic fashion, life as lived by

POOR COPY

BLEED THROUGH

an illiterate Southern white farm family, the activities of which were "largely sexual"; that the book had literary merit and was a sincere attempt to present with truth and honesty a segment of life in the United States; that the author had set out to paint a "realistic picture" which necessarily contained "certain details"; and that because such details related to "the sex side of life, portrayed with brutal frankness" the Court could not say that the picture should not have been created at all. (Compare with here.)

However, in several cases it has been held that literary style, distinction of authorship and subtlety of thought are entitled to no consideration (*People* v. *Seltzer, supra,* at page 334; *People* v. *Freide,* 133 Misc. 611, 615 (1929)).

On the other hand, in *People* v. *Gotham Book Mart, Inc., supra,* at page 243, the Court, in referring to the *Viking Press* case, said that its holding that the statute is limited to works of pornography did not offer a real solution and was merely an attempt to escape from the "apparent confusion and inconsistency" in the New York cases.

In several cases it has been held that the purpose of the statute is to prohibit the exploitation of smut—dirt in the raw—dirt for dirt's sake (*People* v. *Miller, supra,* p. 447; *People* v. *Gotham Book Mart, Inc., supra,* p. 244; *People* v. *Berg, supra,* p. 545).

(Alpert, in his article, *supra,* at p. 40 fn., suggests that the line between literature and pornography is distinctive enough if certain tests stated there are applied. On all of those tests this book is clearly literature.)

In *People* v. *Fellerman, supra,* 243 App. Div. 64 (1934), aff'd 269 N. Y. 629 (1936), the test applied was "that it tends to lower the standards of right and wrong, that it offends against modesty and that it is subversive of morality".

In *People* v. *Dial Press, supra,* at page 417, obscenity was defined as "contrary to the moral law and tending to subvert respect for decency and morality." In *People* v. *Miller, supra,* it was said "the criterion of decency is fixed by the time, place, geography and all the elements that make for a constantly changing world".

In several cases the judges have followed the Federal test used in *United States* v. *One Book Entitled Ulysses, supra.* (See the *Dial Press* and *Gotham Book Mart, Inc.* cases, *supra.*) In the latter case the test announced was (at p. 244):

> "Whether or not, recognizing the latitude afforded all works of literature and of art, and that tastes may differ, a reasonable, cautious and prudent man environed with the conditions of life as they exist today, and not in some past age, would be justified in believing that the book was obscene and lewd not in certain passages, but in its main purpose and construction and published for no useful purpose, but simply from a desire to cater to the lowest and most sensual part of human nature? In applying these tests, relevancy of the objectionable parts to the theme, the established reputation of the work in the estimation of approved critics, if the book is modern; and the verdict of the past, if it is ancient, are persuasive pieces of evidence."

The decisions by the Court of Appeals and this Court in the *Winters* case, *supra,* have not lifted the fog of interpretations.

In *People* v. *Vanguard Press,* 192 Misc. 125 (May 12, 1947), referred to and applied each of the many different "prevailing standards" mentioned in the above cases but stated:

BLEED THROUGH

POOR COPY

"The standards to be applied have been variously defined, but, it is now generally held, involve a measure limited to the extent to which that effect would be sexually demoralizing (People *v.* Winters, 294 N. Y. 545 (1945))."

Apparently the latest statement in New York is found in *People* v. *Creative Age Press*, 192 Misc. 188, 190, 191 (May 19, 1948), where the decision of this Court in the *Winters* case was cited and this test given:

"To determine whether a book falls within the condemnation of the statute, an evaluation must be made of the extent to which the book as a whole would have a demoralizing effect on its readers, specifically respecting sexual behavior. (See *People* v. *Berg*, 241 App. Div. 543, *supra*.) Various factors should be borne in mind when applying the judicially accepted standards used in measuring that effect. Among others, these factors include the theme of the book, the degree of sincerity of purpose evident in it, its literary worth, the channels used in its distribution, contemporary attitudes toward the literary treatment of sexual behavior and the types of readers (particularly with respect to age and intellectual development) reasonably to be expected to secure it for perusal."

After saying that he cannot find "by any prevailing judicial standard" that the book "would have a sexually demoralizing effect upon its readers, the judge continues:

"Nowhere does the book 'invite to vice or voluptuousness' (*People* v. *Wendling*, 258 N. Y. 451, 454, *supra*), nor would it tend 'to excite lustful and lecherous desires' (*People* v. *Eastman*, 188 N. Y. 478, 480). I find that this book is not obscene or otherwise within the condemnation of the statute."

Similar confusion exists in New York as to who is to be protected, whether it is "every person"; the "young and inexperienced"; "the young, immature, the ignorant and sensually minded"; "readers generally"; "its readers"; "normal and not abnormal people"; the "community"; the "public"; not the mature and intelligent; the normal readers both old and young (See *Fellerman, Pesky, Seltzer, Gotham, St. Hubert Guild, Vanguard Press* and *Creative Age* cases, *supra*).

An analysis of the various New York tests used up to 1938 will be found in Mr. Alpert's article *supra* at pp. 64-5. He concluded that the principal test in New York as announced by the higher courts was substantially the orthodox test based on the *Hicklin* doctrine—whether the tendency of the matter charged is to deprave and corrupt those whose minds are open to such moral influences and into whose hands the matter might fall.

That was the test urged in this case by the State (See People's Briefs below and memorandum herein, 297 N. Y. 687, 688). The courts did not indicate whether or not that test was applied here.

Manifestly, the obscenity statute, as it has been interpreted and applied by New York courts—and as it has applied but not been interpreted in this case—"blankets with uncertainty" whatever may be written (*Thomas* v. *Collins, supra,* at p. 535). Vagueness and uncertainty so vast and all-pervasive seeking to restrict or delimit First Amendment freedoms are wholly at war with the long established constitutional principles surrounding their delimitation (*United States* v. *C.I.O., supra,* at p. 153, Rutledge, J.).

Even "conservative" Massachusetts has recognized that such a test as that suggested in *New York* v. *Winters,* 294

POOR COPY

BLEED THROUGH

N. Y. 545, 551, *supra,* makes the standard an uncertain one, shifting with every new judge or jury, and that such a standard must be rejected as unworkable if not unconstitutional, for it would in effect licence every judge or jury to create their own standard in each case. (*Commonwealth* v. *Isenstadt,* 318 Mass. 543, 550 (1945), banning the widely sold and discussed "Strange Fruit"). Such a statute "leaves open the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against". (*Herndon* v. *Lowry, supra,* at p. 263, quoting from *U. S.* v. *Cohen Grocery Co.,* 255 U. S. 81.)

That precisely is the situation in New York today.

This statute, as interpreted and applied by the New York courts is vague, broad and uncertain to an extreme and provides no ascertainable standard as to conduct or tests to determine guilt. It has not been narrowly drawn, or construed or applied by the courts, in accordance with the requirements of this Court in the "clear and present danger" rule cases. No one can foresee its scope or adequately guard against it. It amounts to a dragnet which may enmesh anyone who writes, especially in regard to sex (*Herndon* case, *supra,* at p. 263, *Thornhill* case, *supra,* at p. 96; *U. S.* v. *C.I.O., supra,* at pp. 141-2).

This Court has clearly indicated that "tendency", reasonable or inherent, or "mere likelihood" are not sufficient to justify a restriction of free expression (*Bridges* and *Herndon* cases, *supra*).

It is time for the application by the States of a new test in this type of case, a test that will be related to the First Amendment and will apply equally to New York, Massachusetts and every other state and to the Federal government. This is the clear and present danger test,

which has proved a practical guide in other types of civil liberties cases.

While the Federal Court cases (which arose under different types of statutes) beginning with the *Ulysses* decision, have overruled the rigorous, "tendency" doctrine of *Regina* v. *Hicklin* (LR 3 Q.B. 360) and have used other, enlightened tests they have had no occasion to consider or apply the question in relation to the First Amendment. (See *U. S.* v. *One Book Entitled Ulysses*, 72 Fed. 2nd 705 (C. C. A. 2nd, 1934); *U. S.* v. *Levine*, 83 Fed. 2nd 156 (C. C. A. 2nd, 1936); *Palmelee* v. *U. S.*, 113 Fed. 2nd 729 (C. C. A. Dist. Cal., 1940); cf. *Swearingen* v *U. S.*, 161 U. S. 446, 451 (1896); *Rosen* v. *U. S.*, 161 U. S. 29, 43 (1896)). In Massachusetts a rigorous, "substantial tendency" test is still being applied, though the Massachusetts obscenity statute recently has been liberalized in some respects. (See Laws of Mass., chap. 278, Acts of 1945, Secs. 28A-H; *Commonwealth* v. *Isenstadt*, *supra*).

These are the jurisdictions in this country where most, if not all, of the obscene literature cases have arisen, possibly because of the private censor organizations operating therein or because the largest publication houses are located there and the censor's real desire is to suppress at the source and regulate the reading habits and morals of the whole nation (Alpert, *supra*, at p. 53). It may be doubted that these states (or New York City and Boston where the suppression generally occurs, at the instance of a private censorship group) are the moral citadels of America or have "public morals" superior to that prevailing in other states where censorship of literature is practically unknown.

In the *Isenstadt* case, *supra*, at p. 558, incidentally, the Massachusetts Supreme Court specifically rejected the

POOR COPY

BLEED THROUGH

"clear and present doctrine", but thought, if it applies to such cases "danger of corruption of the public mind would be sufficient danger to satisfy".

The standard in New York has been and still is an uncertain one, in effect shifting with every new judge or bench.

On the basis of these tests how can any author or publisher know where are the permissible limits of free expression or guard against punishment?

How would such classics as "The Song of Solomon" and other books of the Bible, Shakespeare's "Venus and Adonis" and "Anthony and Cleopatra", Voltaire's "Candide", Ovid's "Art of Love" (to take a few examples) pass the test either when written or now? How could their authors have been advised so as to avoid censorship and criminal punishment?

Should authors and publishers today be compelled to be put to the risk and peril that some judge will find their work has a "tendency" or "likelihood" to cause some evil which the legislature has not specified but which the courts varyingly refer to in vague terms in each new opinion or that some reader will be caused thereby to have some added stirring of desire or "impurity" of thought. Only a master, if any, could walk the perilous wire strung by the criteria of this statute as interpreted by the New York Courts (*U. S.* v. *C.I.O., supra,* at p. 153, Rutledge, J.).

What evil exactly was the statute intended to prevent? Is it related to possible criminal acts or breaches of the peace or to mental and emotional reactions the true source of which no one can be sure and the effect of which is not apparent? Is it substantial and extremely serious? Did New York have a right to prevent that evil as an exercise of the police power as against the guarantees in the First

Amendment? Did the publication and sale of the book create or threaten any danger that such evils would result? And, if so, was that danger clear, present, immediate rather than remote, probable, doubtful or possible?

These are the tests which New York should have considered and applied in this case, and did not.

POINT III

It is a matter of paramount public importance that freedom of artistic and literary expression be not confined, at least not short of the furthermost constitutional boundaries of protected expression.

There is no more vital freedom in a democracy than the freedom of expression. It is a national right, federally guaranteed. It transcends State lines.

The Federal Constitution was established by all of the people of the land "to promote the general welfare" and to secure the blessings of liberty to posterity (Preamble). It could not have been adopted without the promised inclusion of the Bill of Rights. The First Amendment is in promotion of the "general welfare" of the entire country. It transcends any local public welfare of States. The superior rights of all United States citizens should not be curtailed on the theory that some State regards it necessary for its local public welfare.

The field of literature and artistic expression is not confined to any country, state or locality. It is impervious to State lines. Persons of literary ability and genius may spring from any place or strata of society in any period of time. More frequently than not, their lives have been marked by struggle, hardship and poverty.

POOR COPY

BLEED THROUGH

The business of publishing, distributing and selling books is nation-wide, if not world-wide. The great publishing houses in New York and Massachusetts do not publish books merely for the benefit of citizens of those States, but for citizens of every state and nation.

History has shown that society is too greatly indebted to creators of literature to suppress their genius by statute or by judicial decree or otherwise. The classic in literature usually is not recognized as such when it first appears or for a long time thereafter. History also shows that many of our classics in literature were at first greeted with scorn, disapproval and proscription, because expressions therein went beyond the conventions of the day.

The lessons of history in these fields should not be easily forgotten. A few examples will suffice. Hugo's books, including "Les Miserables", were claimed to be immoral and were placed on the index librorum prohibitorum. Voltaire's works were condemned and his life and liberty were in frequent jeopardy as a result of his writings; yet a recognized authority has said that he did "more to destroy the greatest of human curses than any other of the sons of men" (*Lecky's* "Rationalism in Europe", Vol. II, p. 71; see also *St. Hubert Guild* v. *Quinn, supra,* at pp. 341-2, in which a New York Court, as late as 1909, was asked to find Voltaire's "The Philosophical Dictionary" immoral and obscene and in which the Court stated "the last time it was judicially condemned • • • was in France in 1766, when it was publicly burned in the streets of Paris").

Lord Eldon's foolish judgments proscribing Southey's "Wat Tyler" and Byron's "Cain" and the finding of a jury under a charge by Lord Denman that the publication of Shelley's "Queen Mab" was an indictable offense,

should be a warning today to all who have to determine the limits of the field within which authors may exercise themselves (see *Southey* v. *Sherwood*, 2 Meriv. 437; 6 Petersdorff Abr. 558, 559; *Maxon's* case, 2 Mod. St. Tr. 356 and *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146, 157, fn. 19 and *United States* v. *One Book Entitled Ulysses, supra*, at p. 708).

The most famous case of literary censorship was the proceedings brought against Flaubert for his writing of "Madame Bovary". *Strachey* in "Landmarks in French Literature", at page 235, calls Flaubert "the greatest prose writer of the age * * *. There has never been a writer who took his art with such a passionate seriousness, who struggled so incessantly toward perfection, and who suffered so acutely from the difficulties, the disappointments, the desperate, furious efforts of an unremitting toil." And at page 238 he says:

> "Madame Bovary gives us a picture of life in a French provincial town in the middle of the last century—a picture which, with its unemphatic tones, its strong sensitive, and accurate drawing, its masterly design, produces an effect of absolutely convincing veracity. The character and fate of the wretched woman who forms the central figure of the story come upon us, amid the grim tepidity of their surroundings with extraordinary force."

But in the letters Flaubert wrote at the time the authorities attempted to suppress this book, the effect upon the author and his subsequent writings is apparent.

In Vol. 3 of "Correspondance" (G. Charpentier et Cie. 1887) at page 72 (letter to Mme. Maurice Schlesinger 14 Jan. 1857) he spoke of the danger he ran not only of a year in prison and a fine of 1,000 francs but also that

POOR COPY

BLEED THROUGH

every new volume of his would be scrutinized and picked at by the police so that it would be impossible for him to print a line. The social hypocrisy, he complained, was stupid and shameful. After his partial acquittal he wrote (Vol. 3, p. 77) of the embarrassment which the trial had caused him, that it had diverted his success, and that he did not like such alien things around his art. He was so deeply disgusted that his desire was to return to his solitude, to publish nothing and to cause no more talk, so savage was the hypocrisy.

He turned to work on Salambo, with the scene laid in Carthage 300 years before Christ, because as he stated (Vol. 3, p. 118) there was too much talk of Bovary, his next book would be so far from modern manners that there could be no possible resemblance between his heros and the readers.

Nor does modern American history lack for similar examples. Theodore Dreiser's life has been marred by the censorship of some of his works now regarded as American classics. His "An American Tragedy" was judicially censored and suppressed as obscene in Massachusetts (*Commonwealth* v. *Friede,* 271 Mass. 318; 171 N. E. 472 (1930). About 1918 the John Lane Company which had published "The Genius" was warned by the Society for the Suppression of Vice that the book was obscene. The company decided to cease the sale of the novel. Dreiser recalled the fate of his first book "Sister Carrie" which Doubleday had accepted and then feared to publish. Dreiser insisted that the contract be carried out and Doubleday, after consulting counsel, continued the publication. Some 1,000 copies were printed but somehow never saw the light of day, thus making his first published novel a failure. Dreiser lacked money but a New York

law firm volunteered its services and brought suit against John Lane Company on an agreed statement of fact that if the book be found obscene, Dreiser should not recover. (See *Alpert's* article, *supra,* at p. 58.)

As the opinion in that case states (*Dreiser* v. *Lane Co.,* 183 App. Div. 773, 775 (1918)) both the author and publisher desired an expression by the Court of its opinion as to whether the book violated the New York law against obscene literature. But the Court neatly avoided the question on the ground that the function of the Court was not to give advisory opinions. Thus was an eminent author stultified, harried and severely damaged by the mere threat of subsequent punishment by a private self-appointed censorship society.

Thus, it is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to this freedom (*Thornhill* v. *Alabama, supra,* at pp. 97, 98).

There was and is no way open to a publisher or author to submit ideas, manuscript or book to a court or other civil authority, before publication, for an ascertainment of whether it is obscene or immoral or unconstitutional, and even if there were, that might result in a censorship prior to publication, which the First Amendment was designed to prevent. They must await a publication and sale, by which time the labor of writing the book and the cost of publishing it have been expended. Even a successful defense of a criminal prosecution causes hardship and loss. Moreover, the ban is likely to fall not only at a crucial time but upon the most important subjects then under discussion (*Bridges* v. *California, supra,* at p. 268).

The remarks of Alpert in his article, *supra,* at page 75, are well worth repeating:

POOR COPY

BLEED THROUGH

"Literature is a social function, and its values, first and last, social values. • • •

"Now ultimate ends and ultimate values are beyond man's perspective. • • •

"Literature, therefore, should not be asked to embody the values of the time. Literature should disseminate ideas, not moralities. If the author's ideas jar the prevailing mores, it is not the ideas which must be suppressed: both can exist cotaneously, and both must so exist if society is not to stagnate, decay, and die. Moralities change; ideas develop; and the change in morals springs from the development of ideas. • • •

"To say that a substantial amount of the normal person's time is occupied with sex is neither to admit a brooding over original sin nor to bellow with Freudian fury about man and woman. It is the statement of an actuality. If, therefore, literature is to be 'pudibund', to be closely restrained in the enunciation of sex ideas, one of the social functions of literature will be vitiated to society's loss."

The greatest menace to freedom is an inert people; it is hazardous to discourage thought and imagination; silence coerced by law is to be eschewed. (*Whitney* v. *California,* 274 U. S. 357, 372, Brandeis, J.)

The infallibility of the judgments of men of law in this field has been questioned (*Halsey* v. *New York Society,* 234 N. Y. 1, 6; *People* v. *Gitter,* 133 Misc. 693, 694). The decisions in New York indicate a reason for that and prove that the fate of the literary artist and his publisher and book should not be left to depend upon the "tender mercies" of private self-appointed censors and guardians of the public morals or even upon the vagaries of judges.

The ultimate good desired is best reached by free trade in ideas (*Abrams* v. *U. S.,* 250 U. S. 616, 630 (1919)

Holmes, J., dissenting). "A book merely obscene soon dies" (*Halsey* case, *supra*, p. 6). A book that does not survive the "competition of the market" cannot live. History shows that society in general is a better judge of literature than private censorship societies or even courts.

In *Hannegan* v. *Esquire, Inc., supra*, at page 157, this Court, in respect of a magazine which the Postmaster General characterized as indecent, vulgar, risque, immoral, improper and not for the public welfare or good, gave expression to views which might well be pondered in relation to the present problem:

> "Under our system of government there is an accommodation for the widest varieties of tastes and ideas. What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals as it does from one generation to another. There doubtless would be a contrariety of views concerning Cervantes' Don Quixote, Shakespeare's Venus and Adonis, or Zola's Nana. But a requirement that literature or art conform to some norm prescribed by an official smacks of an ideology foreign to our system. The basic values implicit in the requirements of the Fourth condition can be served only by uncensored distribution of literature. From the multitude of competing offerings the public will pick and choose. What seems to one to be trash may have for others fleeting or even enduring values."

Today a lawyer who is asked by an author or publisher for an opinion as to whether a projected literary work would be suppressed as obsence cannot honestly answer the question. He is in the position of John Wilkes whose poem "Essay on Woman" was denounced as obscene.

BLEED THROUGH

POOR COPY

Thereafter, in Paris, Madame Pompadour inquired of Wilkes: "How far does the liberty of the press extend in England?" His answer was characteristic "I do not know. I am trying to find out." (See Alpert's article *supra*, at p. 44.)

Here the appellant and every other publisher and author are trying to find out how far the liberty of the press extends in the United States. The inquiry is pertinent and vitally important, not only to authors and publishers and to the reading public, but to society at large. The signposts to "criminality" and to "permissible free expression" are very blurred and difficult to distinguish.

The clear and present danger rule may not be infallible or the last word on the subject, but it has proved to be a good practical working rule and in its application by this Court has brought order out of chaos in many fields where State acts and laws have impinged on the federally guaranteed civil liberties. It can bring order in the very confused field of judicially censored "obscene" literature.

Some conclusions of present application can be drawn from the famous cases of judicial literary censorship.

1. No standards are now ascertainable, either as to the "evil" aimed at or the tests of guilt. No one may know when his book may by some censor be considered "against good morals" or "obscene". No law has ever set a standard so that an author may be said to knowingly violate it. The standards are purely personal. And they vary widely between individuals and from day to day with the same individual.

2. The whole subject impinges upon common concepts of free speech—that a literary book openly published and sold and with the author's and publisher's names stated has a right to a hearing before the public.

3. The censors generally apply their condemnation to newly published works. There is some peculiar feeling that books already published may be openly sold without harming morals. "Madame Bovary", for instance, in English translation can be sold without danger. But were it published for the first time today, it would have to run the gauntlet to survive. There is this strange feeling that public morals are harmfully affected only by books and by recently published books. The unascertainable standards are eccentrically applied.

4. The loss to society, as indicated by the example of "Madame Bovary" is not only in regard to the book involved, but in preventing the next book being written.

Conclusion

Here, for the first time, is presented to this Court an opportunity to determine the limits of free expression, under the Constitution, in relation to State obscenity statutes in the great and important field of literature. Decisions in the State courts have created vast uncertainty and confusion and have ignored the Constitutional principles and tests. The fate of this book is important, but more important is the fate of future literature and the principles that hereafter will set the pattern in this class of case.

We believe and respectfully submit that the decision below should be reversed with a clarifying and authoritative statement of the applicable constitutional principles and tests.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae,

KENNETH W. GREENAWALT,
of Counsel.

POOR COPY

OCTOBER 25, 1948.

Per Curiam Decisions.

No. 11. DOUBLEDAY & Co., INC. *v.* NEW YORK. Appeal from the Court of Appeals of New York. Argued October 21, 1948. Decided October 25, 1948. *Per Curiam:* The judgment is affirmed by an equally divided Court. MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case. *Whitney North Seymour* argued the cause for appellant. With him on the brief was *George G. Gallantz*. *Whitman Knapp* argued the cause for appellee. With him on the brief was *Frank S. Hogan*. *Kenneth W. Greenawalt* filed a brief

POOR COPY

BLEED THROUGH

for the American Civil Liberties Union, as *amicus curiae*, urging reversal. Reported below: 297 N. Y. 687, 77 N. E. 2d 6.